

REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE

AND

THE LORDS

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ON

APPEAL FROM THE SUDDER DEWANNY ADAWLUT
AND HIGH COURTS OF JUDICATURE

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ., M.A.,
ONE OF HER MAJESTY'S COUNSEL.

VOL. XII.

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By clause XVI. of the 3rd & 4th Vict. c. 86, the Act for the better enforcing Church discipline, Archbishops and Bishops, Members of the Privy Council, are members of the Judicial Committee in all appeals under that Act.

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APPENDIX.

MEMORANDUM OF THE LORDS OF THE COUNCIL ON THE REMOVAL OF COLONIAL JUDGES.

THE following Memorandum with reference to the removal of Colonial Judges having been drawn up by Order of the Lord President, in pursuance of a request from the Earl *Granville*, the Secretary of State for the Colonial Department, after having been submitted to and confirmed by the Lords of the Council, was presented and laid on the table of the House of Lords.

“The Lord President, in answer to the question submitted to this department and to the Lords of the Judicial Committee by direction of Earl *Granville*, has caused the following Memorandum to be prepared, for the purpose of explaining the views taken by their Lordships on the subject of the removal of Colonial Judges, as far as they may be gathered from reported cases, and from the experience of the last thirty years.

“It is obvious that some effectual means ought to exist for the removal of Colonial Judges charged with grave misconduct, and that these means ought to be less cumbrous than those existing for the removal of one of Her Majesty's Judges in this Country. The mode of procedure ought to be such as to protect Judges against the party and personal feelings which sometimes sway Colonial Legislatures, and to ensure to the accused party a full and fair hearing before an impartial and elevated Tribunal. Hence it was considered in the case of Mr. Justice *Boothby*, that although the Legislature of *South Australia* had passed addresses to the Crown for his removal, that measure did not suffice, as it would have done in *England*; and that although the Legislature might act as his Accuser, it rested with the advisers of the Crown in *England* to dispose of the charges against him.

“All the forms of suspension or removal which are in use lead by different roads to the same result, viz., a hearing before the Privy Council.

“When a positive ‘motion’ has been made by a Governor under *Burke's Act* (22nd *Geo. III.* c. 75), the appeal to the Queen in Council is *strictissimi juris*, being provided by the Statute itself.

“When an Order of suspension from office has been made, the matter has commonly been referred by the Queen to the Judicial Committee, on the recommendation of the Secretary of State, though not invariably so, as in some cases the Secretary of State has himself advised the Crown to confirm or to disallow the suspension.

“ The reference may be made to the Judicial Committee, or to a Committee of Council generally ; but if it be made to the Judicial Committee, it is desirable that the Lord President and the Secretary of State for the Colonies should sit with the Judges on the hearing. This course has been pursued with advantage in several instances.

“ When charges are brought by a Colonial Assembly against a Judge, in the shape of a petition to the Queen in Council for his removal, as in the cases of Chief Justice *Boulton*, from *Newfoundland* ; Mr. Justice *Sanderson*, from *Grenada* ; and Chief Justice *Beaumont*, from *British Guiana*, the Privy Council exercises a species of original jurisdiction on these petitions, which shall be considered presently.

“ It may be remarked, generally, that it is extremely difficult, and might be highly injurious to the public service, to lay down an inflexible rule as to the mode of procedure to be adopted in all cases of this nature. When a Judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions, on evidence sufficient to satisfy the Executive Government of the Colony of his guilt, it would be extremely improper that he should continue in the exercise of judicial functions during the whole time required for a reference to *England*, or a protracted investigation before the Privy Council. Immediate suspension is in such cases a necessity, if much greater evils are to be avoided. But it must be borne in mind, that a Governor who resorts to such a measure, takes it at his own peril, and is bound to

make out a complete case in justification of it. When such cases come to be investigated at home, both the Governor and the Judge are in reality on their trial; and to have taken unwarrantable proceedings against a Judge, would doubtless be regarded as a most serious offence on the part of an Executive Officer.

“ On the other hand, when the charges against a Judge consist, not in any alleged acts of personal misconduct, but in a cumulative case of judicial perversity, tending to lower the dignity of his office, and perhaps to set the community in a flame, it is more difficult for the local Executive to act on its own responsibility. It is in cases of this description that petitions for the removal of Judges have been addressed to the Queen in Council by Colonial Legislatures.

“ This last-mentioned mode of proceeding has been found by the Lords of the Judicial Committee to be more dilatory, more expensive, more onerous to the parties, and less satisfactory to their Lordships than the mode by way of previous suspension or amotion. And that for the following reasons:—The Privy Council, accustomed to act as a Court of appeal, that is, to review the evidence and decision of inferior Tribunals, has by its constitution considerable difficulty in exercising an original jurisdiction, especially when the evidence has to be transmitted from the Colonies. No regular system of pleadings and procedure can be said to exist in such cases. The consequence is, that the charges being often loose, vague, and multifarious, their Lordships have not found it easy to reduce them to distinct and

positive issues of fact or of law, such as are necessary to the maintenance of a quasi-criminal proceeding.

"As in Ecclesiastical suits for the correction or removal of Clerks, to which these proceedings offer some analogy, it is essential that the acts complained of should be clearly expressed, and that the accused person should have full notice of all that is to be proved against him.

"When the issues are settled, comes the difficulty of the evidence. Both sides produce affidavits and other written testimony from the Colony. When a batch of affidavits has been filed on one side, application is made by the other side for time to answer them. Great delay and expense ensue; and, as in the case of Mr. *Beaumont*, this kind of irregularity may protract the hearing of the case for two or three years, during which time the Judge, whom the Colony is seeking to remove, retains his office. When the case is completed by the parties or their agents, and brought in for argument, it is often loaded with a mass of irrelevant matter. Over these proceedings, regulated as they are by the advice of Counsel on either side, their Lordships can exercise but little control in the preliminary stages of the case, being themselves unacquainted with the merits of it.

"The mode of motion with the right of appeal, or of temporary suspension with a reference to *England*, is not open to these objections. The evil of an inefficient or discredited Judicial Officer is at once removed. The Governor who feels called upon to take so decided a step, is bound to give to the accused person full notice of all the charges brought against

him, to call upon him for his answer and to hear it. This, therefore, affords a solid groundwork for his subsequent proceedings.

“ Furthermore, the Governor, knowing that his decision will be reviewed in *England* on appeal, is bound, for his own justification, to send home the proceedings and evidence on which that decision rests, in a clear and intelligible shape, and provision is made for the performance of this duty, Nos. 83, 84, 85, and 86, of the Colonial Regulations.

“ If the matter is then referred by Her Majesty in Council to the Judicial Committee, their Lordships are at once in a position to deal with it. The delay and expense incidental to getting up a case at a distance from the original scene in dispute, vanish. The case is, or ought to be, already complete. And if it be at once submitted to the judgment of their Lordships in a complete form, there is no reason that it should not be heard and disposed of in a very short time, and at a small expense. Mr. *Cloete's* case (8 Moore's P.C. Cases, 484) is a fair sample of a proceeding judiciously conducted in this manner. That Gentleman had been improperly removed from a judicial office on the 19th *April*, 1853; he was restored to it by their Lordships on the 20th of *February*, 1854, and although he had undoubtedly suffered an injustice, their Lordships expressed their desire that he should be indemnified for the expense he had been unjustly put to; and he was, in fact, soon afterwards promoted to a higher judicial office.

“ It is scarcely necessary to add, that in Colonies

having Legislative Assemblies, those Assemblies cannot be deprived of their undoubted constitutional right to address the Crown for the removal of a Judge; and the exercise of this right is altogether independent of the course which the Governor of the Colony may think fit to adopt. When the charges against a judicial Officer originate with Assemblies, the form of Address or petition is perhaps the most correct, though not the most convenient, form of proceeding. When the action for removal originates with the Governor, he has the power to give effect to it in his own hands, subject to the control of the Home Authorities.

“The experience of the Lords of the Council, therefore, strongly corroborates the arguments stated in a paper (presented to the Colonial Office by Sir *F. Roger*) in favour of proceedings by the Governor, subject to a review by the Secretary of State or the Privy Council in *England*, and they have invariably found, that in the cases in which proceedings have originated with the local Assemblies, the delay, uncertainty, and expense have been greatly augmented.

“At the same time, when the misconduct charged is purely judicial, and, therefore not properly amenable to the decision of the Executive authority, acting on the advice of Law Officers or advisers of inferior rank, it would seem that the due maintenance of the independence of Judges requires that judicial acts should only be brought into question before some Tribunal of weight and wisdom enough to pronounce definitely upon them, and this function appertains with peculiar fitness to the Privy Council, which, as

a Court of appeal, has to review the decisions of the Colonial Courts."

Observations by Lord *Chelmsford* upon the Memorandum with reference to the removal of Colonial Judges :—

"I concur generally in the views expressed in this Memorandum.

"The question of the removal or suspension of a Colonial Judge is one of great delicacy and of some difficulty; but, upon the whole, I think that in all cases, except those which sometimes occur, of judicial indiscretion or indecorum, the best system is that which leaves the responsibility in the first instance to the Governor of the Colony, subject to an appeal to the Queen in Council. Of course, so serious a step as the removal or suspension of a Judge ought not to be taken without a distinct communication being previously made of the specific charges of misconduct imputed, and without an ample opportunity being afforded to the Judge of answering those charges. In every instance of this kind it seems to me, that it would be better that the matter should be brought before the Privy Council, rather than that the final decision should rest with the Secretary of State, because the reasons for the determination in the latter case are not made public (publicity in an accusation of a Judge being always desirable), and because an impression sometimes prevails that there is an inclination in the Colonial Office to uphold their Governors upon any subject of complaint which arises in the Colonies.

“When I speak of judicial indiscretion or indecorum, it may be difficult to explain my meaning in words, yet it will probably be sufficiently understood. As an illustration, I would mention ebullitions of temper and intemperate language, leading continually to unseemly altercations and undignified exhibitions in Court. Upon occasions like these, different opinions may be entertained whether the conduct of the Judge is such as to render him unfit to continue upon the Bench. I think the evil of allowing such a Judge to exercise his functions while his conduct is being inquired into, would not be so great as permitting a Governor to determine upon his own judgment and discretion, that the behaviour of the Judge was so incompatible with the temperate and dignified administration of justice, as to render it desirable, on public grounds, that he should be removed. In these cases it would be better, in my opinion, to inform the Judge of the specific instances in which it is alleged that he has not preserved the decorum of his judicial character, and to call upon him for distinct answers to the charges, with an intimation that the whole will be sent home for the decision of the Privy Council.

“These observations do not apply to grave charges of judicial delinquency, such as corruption ; or to cases of immorality, or criminal misconduct. Instances of this kind ought to be visited by immediate removal from the Bench (of course, not before a full opportunity has been afforded to the accused Judge to defend himself). Such serious cases ought to be brought before the Privy Council, either by appeal on the part of the removed or suspended Judge,

or upon the recommendation of the Secretary of State.

“CHELMSFORD.

“9th April, 1870.”

Opinion of the Right Hon. *Stephen Lushington*, D.C.L., late Judge of the Admiralty, on the foregoing Memorandum :—

“It is, I think, perfectly clear, that all inquiries into the alleged misconduct of Colonial Judges must be attended with difficulty, and in most cases with some mischievous consequences.

“I entertain no doubt in my own mind, that the most efficacious means of proceeding, and productive of the least evil consequences, is that the Governors of the Colonies respectively should be entrusted with the power of investigating any alleged charges against the Judges, and, if in their opinion need be, of suspending them ; of course, all the proceedings and the evidence upon which they act should be remitted without delay to the Colonial Office, and, if need be, Her Majesty will be advised to remit the case to the consideration of the Privy Council. I apprehend that the Judicial Committee has no peculiar claim to take cognizance of such a case.

“I think the propriety of the Colonial Governor being invested with this power, great as it is, would be more apparent if contrasted with any other mode of proceeding than that suggested.

" I forbear to enter into those particulars, not only because they are obvious, but also because I feel confident the consideration of them would naturally occur to all who have to look into this question.

" S. L.

" *April 14, 1870.*"

Opinion of the Right Hon. Sir *Edward Ryan* on the foregoing Memorandum :—

" I entirely concur in the opinion expressed by Lord *Chelmsford* and Dr. *Lushington*, and in the Memorandum, that the best mode of proceeding, and productive of the least evil consequences, in most cases, will be to leave the responsibility, in the first instance, to the Governor of the Colony, subject to an appeal to the Queen in Council.

" I agree with Dr. *Lushington* in thinking that the Judicial Committee has no 'peculiar claim' to take cognizance of such cases, though probably the Secretary of State would generally be desirous of referring such cases to that body. In the case of *Willis v. Gipps* (5 Moore's P. C. Cases, 379), the then Lord President (the Duke of *Buccleugh*), with the Lord Chancellor (Lord *Cottenham*), Lord *Brougham*, Chief Justice *Tindal*, Mr. Baron *Parke*, the Right Hon. *T. Pemberton Leigh*, and the Right Hon. *W. E. Gladstone*, sat on the Judicial Committee upon an appeal against an Order of Amotion.

" I concur in the arguments stated in Sir *F. Roger's* paper in favour of proceedings by the Governor, subject to a review by the Secretary of State, or the

Privy Council, and generally in the view so clearly stated in the Memorandum, as to the course of proceeding in cases of his nature before the Privy Council.

“ E. R.

“ *April 21, 1870.*”

APPENDIX.

ORDER IN COUNCIL FOR THE ESTABLISHMENT OF CERTAIN RULES TO BE OBSERVED BY PROCTORS, SOLICITORS, AGENTS, AND OTHER PERSONS ADMITTED TO PRACTISE BEFORE HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

At the Court at *Windsor*, the 31st day of *March*,
1870.

Present:—The Queen's Most Excellent Majesty in
Council.

WHEREAS there was this day read at the Board a representation from the Lords of the Judicial Committee of the Privy Council, dated the 26th day of *March* instant, humbly recommending to Her Majesty in Council, that certain Rules be established by the authority of Her Majesty, by and with the advice of Her Privy Council, to be observed by all Proctors, Solicitors, Attorneys, Agents, or other Persons employed in the conduct of appeals, petitions, or other matters pending before Her Majesty in Council, Her Majesty having taken the said representation into consideration, and the schedule of Rules hereunto annexed, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, and it is hereby ordered, that the same be punctually observed, obeyed, and carried into execution.

ARTHUR HELPS.

SCHEDULE ANNEXED TO THE FOREGOING ORDER.

1. Every Proctor, Solicitor, or Agent admitted to practise before Her Majesty's Most Honourable Privy Council, or any of the Committees thereof, shall subscribe a declaration, to be enrolled in the Privy Council Office, engaging to observe and obey the Rules, Regulations, Orders, and practice of the Privy Council; and also to pay and discharge, from time to time, when the same shall be demanded, all fees or charges due and payable upon any matter pending before Her Majesty in Council; and no person shall be admitted to practise, or allowed to continue to practise, before the Privy Council, without having subscribed such declaration in the following terms:—

FORM OF DECLARATION.

WE, the undersigned, do hereby declare, that we desire and intend to practise as Solicitors or Agents in appeals and other matters pending before Her Majesty in Council; and we severally and respectively do hereby engage to observe, submit to, perform, and abide by all and every the Orders, Rules, Regulations, and practice of Her Majesty's Most Honourable Privy Council and the Committees thereof now in force, or hereafter from time to time to be made; and also to pay and discharge, from time to time, when the same shall be demanded, all fees, charges, and sums of money due and payable in respect of any appeal, petition, or other matter in and upon which we shall severally and respectively appear as such Solicitors or Agents.

II. Every Proctor, Solicitor, or Attorney practising in London, and duly admitted in any of the Courts of *Westminster*, shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council, upon the production of his Certificate for the current year; and no fee shall be payable by him on the enrolment of his signature to the foregoing declaration.

III. Persons not being certificated *London* Solicitors, but having been duly admitted to practise as Solicitors by the High Courts of Judicature in *India* or in the Colonies respectively, may apply, by petition, to the Lords of the Judicial Committee of the Privy Council for leave to be admitted to practise in the Privy Council; and such persons, if admitted to practise by an Order of their Lordships, shall pay annually, on the 15th *November*, a fee of five Guineas to the Fee Fund of the Council Office.

IV. Any Proctor, Solicitor, Agent, or other person practising before the Privy Council, who shall wilfully act in violation of the Rules and practice of the Privy Council, or of any Rules prescribed by the authority of Her Majesty, or of the Lords of the Council, or who shall wilfully misconduct himself in prosecuting proceedings before the Privy Council, or any Committee thereof, or who shall refuse or omit to pay the Council Office fees or charges payable from him when demanded, shall be liable to an absolute or temporary prohibition to practise before the Privy Council, by the authority of the Lords of the Judicial Committee of the Privy Council, upon cause shown at their Lordships' Bar.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

BABOO BEER PERTAB SAHEE ... *Appellant,*

AND

MAHARAJAH RAJENDER PERTAB SAHEE, *Respondent ;*

And cross appeal,

MAHARAJAH RAJENDER PERTAB SAHEE, *Appellant,*

AND

BABOO BEER PERTAB SAHEE ... *Respondent.**

*On appeal from the High Court of Judicature at
Bengal.*

THE subject of the first appeal related to the succession to the *Zemindary* or *Raj* of *Hunsapore*, in the *Zillahs* of *Sarun* and *Goruckpore*, in the District

6th, 7th, 9th,
10th, & 19th
Dec., 1867.

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

The *Zemindary* of *Hunsapore* in *Behar* is an impartible *Raj*, which by family usage and custom

descended, for many generations, on the death of each successive *Rajah*, to his eldest male heir, according to the rule of primogeniture, subject

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of *Behar*, of which *Maharajah Chutterdharee Sahee* died seized, and raised two principal questions: first, whether the estate was by family custom and usage a *Raj*, impartible and indivisible, descending to a single male heir to the exclusion of the co-heirs; and secondly, as to the power of the *Maharajah*, according to the Hindoo law of the *Benares* school, to make a testamentary disposition of a *Raj* to one member of his family to the prejudice of his other male descendants and co-heirs. The second, or cross appeal, was confined to such parts of the High Court's decree which directed an allowance of Rs. 1,000 *per mensem*

to the burthen of making *Babooana* allowances to the junior members of the family for maintenance.

In the year 1767, *F.*, the then reigning *Rajah* of *Hunsapore* having rebelled against the British Government, was expelled by force of arms, and the *Raj* confiscated by Government, who kept possession of the same for upwards of twenty years, and ultimately, in 1790, granted the *Raj* to *C.*, a younger member of the family of *F.*, on whom, some years afterwards, the Government conferred the title of *Rajah*. Held,—that, although the *Zemindary* was to be treated as the self-acquired estate of *C.*, yet that the grant being from the ruling power, in the absence of evidence of the intention of the Grantors to the contrary, carried the incidents of the family tenure as a *Raj*, as the Government's intention must be taken to have been to restore the estate as it existed before its confiscation, with no change other than that as affected *F.* and his descendants, and was not, therefore, the creation of a new tenure, but simply a change of tenant, by the exercise of a *vis major*.

Held further, that the title of *Rajah* is not absolutely essential to the tenure of a *Raj*.

Ben. Reg. XI. of 1793, does not affect the succession by special custom, of a single male heir to a *Raj*, or subject it to the ordinary Hindoo law of succession.

Although there is no mention in the ancient Hindoo Treatises of a testamentary disposition, yet modern authorities have determined, that a Hindoo has testamentary power, which can be exercised by him, at least within the limits which the Hindoo law prescribes to alienation by gift *inter vivos*.

Where the *Mitácshará* prevails, a Hindoo without male descendants may dispose by Will of his separate and self-acquired property, whether movable or immovable. If there be male descendants, he may by Will dispose of self-acquired movable property, subject to the restriction, that he cannot wholly disinherit any one of such descendants.

Whether, by the *Benares* school of Hindoo law, a Hindoo can by Will make an unequal distribution of self-acquired immovable property without the consent of his male descendants? *Quære*.

If a party founds his title on a nuncupative Will, it is incumbent on him, in so uncertain a foundation as spoken words, to allege in the pleadings with the utmost precision, as well as to prove, the words on which the party relies, and every circumstance of time and place.

to *Baboo Beer Pertab Sahee*, for maintenance as a member of the family, the non-admission of the verbal appointment of the Respondent as the successor to the estate, an alleged nuncupative Will of the late *Maharajah*, and lastly, with respect to the costs awarded.

The history of the case was as follows :—

The *Raj* of *Hunsapore*, an ancestral ancient Tributary Principality, was, by the evidence in the suit, traced back as being held as an entire estate in the same family for upwards of two hundred years. The common ancestor was *Rajah Beer Sein*, and each successive possessor of the *Raj*, during the whole of that period, had been a sole male heir of the *Rajah* last seized, and the eldest or nearest in the line of succession, without a single instance of the succession of the relations of any heir succeeding as co-perceners or joint heirs to the ancestral estate. The other members of each successive *Rajah* being entitled only to an allowance out of the estate for maintenance and support. This course of descent to the rights in the *Raj* continued uninterruptedly down to one *Rajah Futteh Sahee*, who, having rebelled against the British Government, was, in the year 1767, expelled from his possessions by force of arms, and the *Raj* confiscated and taken possession of by the East India Company. From that period until the year 1790 the *Raj* remained in their possession, and they leased the same to Farmers. In that year the East India Company, after repeated applications by members of the deposed *Rajah's* family for its restoration, by a *Firman* granted the *Raj* to *Chutterdharee Sahee*, the representative of a younger branch of the family, and put him, then a minor, in possession, and afterwards conferred on him the title of *Rajah*. *Rajah Chutterdharee*

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Sahee had issue two Sons, who predeceased him. The eldest, *Ram Sahee*, left two Sons, *Ongur Pertab* (the Respondent's Father), and *Baboo Deoraj Sahee*, him surviving, and the younger Son, *Puthee Paul Sahee*, also left two Sons, named *Telluckdharee Sahee* and the Appellant, *Baboo Beer Pertab Sahee*. *Ongur Pertab* had issue a Son, the Respondent, *Maharajah Rajender Pertab Sahee*, whom it was alleged, *Maharajah Chutterdheree Sahee*, the day before his death, verbally appointed to succeed to the *Raj* as his heir, and installed him as *Rajah*. It appeared, that the *Maharajah* afterwards executed a written Will, or testamentary disposition, dated the 16th of *March*, 1858, shortly before his death, appointing the Respondent, *Maharajah Rajender Pertab Sahee*, his great-grandson, his sole heir and successor to the *Raj*. Disputes having arisen as to the Respondent's right of succession, an investigation took place before the Deputy Collector of the District where the estate was situate, who made an Order to the effect, that the *Raj* had devolved on the Respondent, and his name, as proprietor, was thereupon entered on the Government Records. This Order was affirmed by the Commissioner. Summary suits were also instituted under Act, No. XIX. of 1841, for appointment of a Curator; and under Act, No. XX. of 1841, for a certificate of administration, and the Judge, Mr. *Atherton*, on the 22nd of *May*, 1858, declared the Respondent entitled, and his possession, as successor to *Rajah Chutterdharee Sahee*, was confirmed by a judgment of the late *Sudder Dewanny Adawlut*, on the 26th of *August*, 1858.

Some time afterwards Government conferred on the Respondent the title of *Maharajah*.

In consequence of these proceedings the suit, out of which the principal appeal arose, was commenced in *March*, 1859, in the *Zillah* Court of *Sarun*, by the Appellant and his Brother, *Tilluckdharee Sahee*, (who afterwards withdrew from the suit), as two of the Grandsons and joint heirs of *Maharajah Chutterdharee Sahee*, against the Respondent, *Ongur Pertab*, his Father (who waived and surrendered his rights by inheritance in favour of his Son, the Respondent), *Deoraj*, his Uncle, and others, to dispossess the Respondent of a moiety of the above-mentioned *Raj* or *Zemindary*, and for a declaration by the Court, that the *Raj* or *Zemindary* was liable to division and partition, as ordinary immovable and movable property by the Hindoo law, and also seeking as subsidiary to the former, to set aside the summary proceedings under the Acts, Nos. XIX. and XX. of 1841, as well as the Orders of the Revenue authorities for recording the Respondent's name in the Books of the Government Collector as sole proprietor of the *Raj*.

The principal questions raised by the suit were, first, whether the *Zemindary*, which was admitted to have been an ancient family *Raj*, and had descended through a regular succession of ancestors, had been originally, and down to the time of *Rajah Futteh Sahee*, impartible and only descendible to one sole heir, or whether it was divisible and descendible as ordinary property by Hindoo law to the general heirs; and secondly, whether, if established to have been impartible and descendible to a single heir, the rebellion and flight of *Rajah Futteh Sahee* and the consequent *khas* management of the *Zemindary* by the East India Company, for a long period of years, and the subsequent transfer by the

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Government, and settlement with the *Maharajah Chutterdharee Sahee* (such transfer being made to him as a member of the same family, and as next heir in the established line of succession after the *Rajah Futteh Sahee* and his Sons) had necessarily the effect of destroying the original tenure of the *Raj* as a Tributary Principality, under the customary law of the country, and also according to the particular custom of the family, and so destroying the legal incidents of the tenure as regarded the inheritance and the succession of a sole heir. There were also other subordinate questions of fact raised in the suit respecting the validity of, first, the alleged verbal appointment and installation of the Appellant and a nuncupative Will of the late *Maharajah*; and secondly, a written Will, subsequently executed by him, by which the Respondent was appointed the *Maharajah's* sole successor.

By the decree of Mr. *D. G. Wilkins*, the Judge of the *Zillah* Court of *Sarun*, dated the 24th of *August*, 1860, it was declared, that the *Raj* was an ancient Tributary Principality, impartible, and as such, inheritable by the eldest male heir solely; that the Plaintiffs had failed to prove that it was ever subjected to division or partition during the long course of succession thereto; and that the original and established course of descent to a single male heir had not been broken up or destroyed by the displacement of the elder branch of the family and the subsequent transfer to and succession of a member of the same family, being the next heir of the late *Maharajah Chutterdharee Sahee*. The decree also declared, that the special course of descent had been established as a family custom or usage, and that such custom was binding on the *Maharajah*, as the representative of the younger branch, as it had been previously on the elder branch, of the same

family, and decided, that the Respondent must be confirmed in his possession of the *Zemindary* in its entirety, without any division or partition, Will or no Will ; but that the nuncupative Will and verbal appointment and assignment of the *Raj* to the Respondent had not been sufficiently proved, nor the written Will, which, if proved, would, the Court considered, be void and inoperative by Hindoo law. It further declared, that the Plaintiffs were entitled, by virtue of the family custom or usage, to an allowance charged on the *Zemindary* for maintenance, which was fixed at the rate of Rs. 2,000 monthly, with arrears to be calculated from the 16th of *March*, 1858 ; and the decree directed the costs of both the Plaintiffs and of all the other Defendants to be payed by the Respondent.

From this decision the Plaintiffs appealed to the High Court at *Calcutta*. The Respondent, *Maharajah Rajender Pertab Sahee*, also appealed on the ground, that the gift and delivery of the *Raj* and the nuncupative and written Wills ought to have been upheld, that the amount decreed for maintenance was excessive, and that the costs ought not to come out of the estate.

Before the appeals were heard, *Tilluckdharee Sahee* assigned his interest in the matters in dispute to his son, *Narnicke Pertab Sahee*, who effected a compromise with the Respondent, the *Maharajah*, and withdrew from the suit, which was afterwards prosecuted by the Appellant alone.

The appeals were heard before Messrs. *Steer* and *Levinge*, two of the Judges of the High Court, and by a decree of that Court, bearing date the 28th of *April*, 1863, the Court affirmed the first portion of the decree of the *Zillah* Court, both as to the legal character of the tenure of the estate and its incidents impressed on the *Raj*, and also as to the

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same having been transferred to and received by the late *Maharajah*, subject to these incidents, but declaring that there had not been any confiscation or forfeiture either in fact or law. The decree also declared that, the *Raj* was one of those Principalities upon which was impressed the law of primogeniture, involving the succession of one member only of the family to the entirety of the estate as an inherent condition essential to its existence, and that the evidence in the suit had proved a family custom or usage to exist in favour of the same course of succession; that the late *Maharajah Chutterdharee Sahee*, being a member of the family, must have received the *Raj* subject to this family, custom or usage, while those who claimed through him, being also members of the family, were equally bound by it. The decree dealt differently with the evidence with respect to the alleged nuncupative Will, declaring that the words and acts of the late *Maharajah* did not amount to a nuncupative Will but were consistent with the supposition that they were said and done by the *Maharajah* in the belief and under the impression that the Respondent would be, under and by virtue of the *kooloochar* (family custom), his sole heir, and as such would succeed to everything. As to the written Will, the decree reversed the *Zillah* Court's finding, on the ground, that it had been established by the evidence; and with respect to the allowance decreed on account of maintenance, the decree altered the *Zillah* Court's decree by cutting down one-half of the sum fixed, and decreeing Rs. 1,000 *per mensem* instead of the Rs. 2,000; and, as to the costs, the *Zillah* Court's decree was also altered and amended by decreeing, that the Respondent should pay his own costs and

his co-Defendant, his Father, *Ongur Pertab's* costs, and the costs of the Plaintiff; but the costs of the other co-Defendants were decreed against the Plaintiffs, as having been unnecessarily incurred, and the parties unnecessarily brought into Court, supported by unfounded and reckless allegations of *Benamee* and fraudulent transfers not attempted to be proved.

From this judgment of the High Court, and the decrees founded thereon, the Appellant brought the present appeal. The Respondent also instituted a cross appeal against those portions of the decree which related to the non-admission of the verbal appointment of the Respondent; the nuncupative Will of the late *Maharajah*; the refusal of his costs; the making the costs of the Plaintiff and of the Defendant, *Ongur Pertab*, payable by him, and also against the allowance of Rs. 1,000 *per mensem* to the Appellant, *Baboo Beer Pertab Sahee*, from the date of the decease of the late *Maharajah*.

Both appeals were heard together.

Mr. *Field*, Q.C., and Mr. *Cave*, for *Baboo Beer Pertab Sahee*,

Argued, that *Maharajah Chutterdharee Sahee's* immovable property did not, at the time of his death, constitute a *Raj* or *Zemindary*, indivisible either by Hindoo law or by family custom; that, assuming that the alleged custom of the descent of the family estate undivided to the eldest Son had prevailed up to the time of the expulsion of *Rajah Futteh Sahee*, such custom, if not then extinguished by the breaking up of the family estate, would follow the elder branch represented by *Rajah Futteh Sahee* and his Sons, or at any rate could not be pleaded by a Son or Grandson of *Rajah Chutterdharee Sahee* himself, belonging to

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the younger part of the family, while the elder branch descendants of *Rajah Futteh Sahee* continued to exist. And they insisted, that the custom, if it ever existed, was broken up and put an end to by a descendant of *Rajah Futteh Sahee*, who, it was alleged, divided the family estate. That, even supposing that a custom of the descent of the family estate undivided prevailed up to the time of *Rajah Futteh Sahee*, the provisions of *Ben. Reg. XI.*, of 1793, would apply to such portion of the property as was situated in the British territories, and would so have applied even had *Rajah Futteh Sahee* himself continued in possession. That the Court below ought to have found that *Maharajah Chutterdharee Sahee* died possessed of immovable property, both ancestral and self-acquired, other than that which had formerly belonged to *Rajah Futteh Sahee*, and to which neither the Hindoo law, with regard to the descent of property forming a *Raj*, nor the alleged family custom (if it ever existed) applied; and it should have declared, the *Baboo Beer Pertab Sahee* was entitled, as one of the heirs of *Maharajah Chutterdharee Sahee*, to succeed to one-fourth of such property, and should have found either that such property comprised all the immovable property of which *Maharajah Chutterdharee Sahee* died possessed, other than that which *Maharajah Rajender Pertab Sahee* proved to have formerly belonged to *Rajah Futteh Sahee*, or should have framed an issue for trial by the Court of the Judge of *Sarun* to determine what part of the immovable estate of which *Maharajah Chulterdharee Sahee* died possessed, had formerly belonged to *Rajah Futteh Sahee*, the burthen of proving the affirmative of such issue being upon the Respondent. That the Court below ought to have found, that *Maharajah Chutterdharee Sahee* had

died possessed of very valuable movable property, to which neither the Hindoo law, with regard to the descent of property forming a *Raj*, nor the alleged family custom (if it ever existed) could apply, and should have declared the Appellant as one of the heirs of *Maharajah Chutterdharee Sahee*, entitled to succeed to one-fourth of such property. That the verbal gift and Wills were rightly held by the Judge of the *Zillah* Court not to have been established. But that, even assuming the gift and Wills were proved, they were inoperative by the Hindoo law of the *Benarès* school; and that, assuming the Appellant to be entitled to maintenance only, he was entitled to the amount fixed by the *Zillah* Judge, together with arrears from the death of *Maharajah Chutterdharee Sahee*, and interest at the rate of twelve per cent., and that such maintenance should have been decreed to be continued to his male issue. And, as to the costs of the suit, it was submitted, that the order of the *Zillah* Judge was, in the peculiar circumstances of the case, right.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for *Maharajah Rajender Pertab Sahee*,

Contended, that the decrees of the Courts below were right in finding and declaring, that the ancient *Raj* or *Zemindary* of *Hunsapore* was originally, and had all along, continued to be an impartible and indivisible estate, descending to the eldest or nearest male heir alone, as a Tributary Principality, according to the custom of the country, and also by the custom of this family. That on those grounds the Respondent, on the death of his Great-grandfather, *Maharajah Chutterdharee Sahee*, and the surrender of the rights of his Father, became

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entitled to succeed to the *Raj* or *Zemindary* as such eldest or nearest male heir of the *Maharajah*, to the exclusion of the Appellant. That the Appellant had failed to prove any interruption or disturbance of the customary course of descent to a single male heir by any such division or partition of the *Raj*, or *Zemindary*, among the general joint heirs, according to Hindoo law, previous to the possession of the late *Maharajah*, and that he also failed to establish that there had been any confiscation, in fact or by law, of the *Raj* or *Zemindary* by the Government as alleged in the plaint; or if there had been such confiscation, that the same, either necessarily and *ipso facto*, determined and put an end to the course of descent under the family custom, or destroyed and obliterated the legal character and incidents of Principality impressed on and inherent in the tenure of the *Raj* or *Zemindary* under the custom of the country. That, even if such alleged confiscation had been established, which was decreed, yet that it was rightly declared upon the evidence by the decrees, that the possession of the *Raj* or *Zemindary* as it then stood, and without any change in its legal character or incidents, was given by the Government to the late *Maharajah*, he being a member of the family, and the nearest male relative of the then former possessor, after his own children, and the late *Maharajah* had accepted and entered into such possession as the successor, *de facto*, to an ancient ancestral estate subject to such family custom; and that further, it was rightly decided, that as the Appellant and the Respondent were also members of the same family, their rights and claims to the succession of the *Raj* or *Zemindary* must be governed by the same family usage and custom. That, if it had been other-

wise found and decided on the facts, and that the late *Maharajah* had, under the transfer of possession to him, taken from the Government a grant, as in effect alleged by the Appellant, of a new and independent estate in the *Raj* or *Zemindary*, in the nature of a grant to him and his heirs general, under the Hindoo law, the late *Maharajah* would have held and possessed the *Raj* or *Zemindary* as a self-acquired estate, and if so, had an absolute power of alienation over the same, and had duly exercised such power in favour of the Respondent, and to the exclusion of the Appellant. That the *Zemindary*, the right of succession to which was in question in the suit, was an ancient *Raj*, and was held and enjoyed as a *Raj* by the late proprietor at the time of his death, and in whom the family title of *Rajah* (for a time in abeyance) had been revived by a grant of the Government many years previous to his death; that the succession to such *Raj* must, therefore, be governed by the custom of the country, which limits the right of succession to a *Raj* to a sole heir, the eldest or nearest male, who was the Respondent, and in whom the title had been continued as such heir by the Government. That the decree of the High Court was right in declaring on the evidence, that the written Will of the late *Maharajah Chutterdharee Sahee* was duly proved; and also that the same was valid by the Hindoo law, and that the Respondent was thereby appointed his successor and heir. That, if the *Raj* or *Zemindary* were to be considered and treated as an ancestral estate in the possession and enjoyment of the late *Maharajah*, the Respondent was entitled to succeed thereto on his death, as such special heir, under the custom of the country, and also under the family custom; and that

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if it were to be considered and treated as a self-acquired estate in the late *Maharajah*, the Respondent was entitled to succeed him, under and by virtue of the special nomination and appointment of him as successor and heir, either under the verbal or the written appointment of the *Maharajah* as proved to have been made. That the *Zemindary* was from time immemorial held as a *Raj*, with all the usual incidents of a *Raj*, and that after it came into the possession of the late *Maharajah Chutterdharee Sahee*, the Government revived in him the family title of *Rajah*, and the *Zemindary* was thereafter held, considered, and treated by him and by all others as a *Raj* up to and at the time of his death. And that, therefore, according to the custom of the country, the same would descend to his eldest or nearest male heir solely, to the exclusion of the other members of his family, including the Appellant, who would only be entitled thereout to maintenance; and that the Respondent was such sole heir, and as such, rightly succeeded to the *Raj*, and his possession thereof had been recognized and confirmed by the Government, who had by a distinct act continued the family title to him.

And, upon the cross appeal, it was submitted by the Respondent that, as it was declared by the decree of the High Court that the witnesses (two European Officers of Government) who gave evidence in support of the nuncupative Will were persons of undoubted veracity, and it sufficiently appeared from their evidence, and confirmed by the petition of the late *Maharajah*, proved to have been sealed and dispatched by him, that his words and acts, constituting the nuncupative Will, were intended by him as a solemn and formal appointment of the Appellant as his successor and heir, and

such appointment was valid and operative according to Hindoo law and custom, without any instrument in writing; that even if such verbal appointment were not to be held valid and operative for the reason in the decree mentioned, namely, that the words and acts of the *Maharajah* spoken to by the witnesses, did not sufficiently show a testamentary intention on his part, or amount to a nuncupative Will, yet that the written petition, with his seal, declaring that he had appointed the Appellant his successor or heir, and expressly excluding his Grandsons from all participation in the inheritance, ought to have been considered in the nature of a valid and binding testamentary disposition, and to which effect ought to have been given. That the direction was wrong, whereby the Appellant was ordered to pay his own costs, and the costs of the Respondent, and also the costs of the co-Defendant, *Ongur Pertab*, notwithstanding that the suit and appeal of the Plaintiffs were dismissed and a decree made generally in favour of this Appellant; and, lastly, that the allowance for maintenance to the Respondent from the death of the late *Maharajah* was excessive, and ought to be reduced and altered, both as regarded the amount and the time from which such maintenance should be decreed to run.

Upon the nature of the tenure and right to succession to *Hunsapore*, whether it constituted, according to family custom and usage, at the date of *Maharajah Chutterdharee Sahee's* death, a *Raj*, impartible and indivisible, descending to a single male heir, as recognized by Hindoo law, the following cases and authorities were referred to:—*Urjim Manic Thakoor v. Ramgunga Deo* (a); *Ranee Soomitra v. Ramgunga* (a) 2 Ben. Sud. Dew. Ad. Rep., 139.

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Manik (a); Maharajah Gurunrain Deo v. Unund Lal Singh (b); Anund Lal Sing Deo v. Maharaja Dheraj Gurrood Narayun Deo (c); Thakoorai Chutturdharee Singh v. Thakoorai Telukdharee Singh (d); Rawut Urjun Sing v. Rawut Ghunsiam Sing (e); Katama Natchier v. The Rajah of Shivagunga (f); Muha Raj Kowur Basdeo Singh v. Muha Rajah Boodur Singh Buhadur (g); Baboo Gunesh Dutt Singh v. Maharaja Moheshur Singh (h); The Secretary of State in Council v. Kamachee Boye Sahaba (i); Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry (k); Koonwur Bodh Singh v. Seonath Singh (l); Ben. Reg. XI., 1793; W. H. Macnaghten's "Hindu Law," Vol. I. p. 18, note; Strange's "Hindu Law," Vol. I., p. 198, note 3 (2nd Edit.), ib. p. 208, ib. Vol. II., p. 328; Inst. of Menu. ch. VIII. par. 41; Elberling on Inheritance, p. 69.

Or, whether, upon the grant and transfer by the Government to *Maharajah Chutterdharee Sahee*, the estate became a self-acquired *Zemindary*, and on his death divisible by the ordinary Hindoo law, *The East India Company v. Syed Ally (m)*, were cited.

- (a) 3 Ben. Sud. Dew. Ad. Rep., 40.
- (b) 6 Ben. Sud. Dew. Ad. Rep., 282.
- (c) 5 Moore's Ind. App. Cases, 82.
- (d) 6 Ben. Sud. Dew. Ad. Rep., 260.
- (e) 5 Moore's Ind. App. Cases, 169.
- (f) 9 Moore's Ind. App. Cases, 539.
- (g) 7 Ben. Sud. Dew. Ad. Rep., 228.
- (h) 6 Moore's Ind. App. Cases, 164.
- (i) 7 Moore's Ind. App. Cases, 476.
- (k) 10 Moore's Ind. App. Cases, 279.
- (l) 2 Ben. Sud. Dew. Ad. Rep., 92.
- (m) 7 Moore's Ind. App. Cases, 555.

With respect to the capacity of a Hindoo by the ordinary Hindoo law, to make a Will, assuming the property self-acquired, and the custom of descent to the *Raj* to a single heir not to prevail, *Nana Narain Deo v. Huree Punth Bhao* (a); *Mulraz Lachmia v. Chalekany Vencata Rama Jagganadha Row* (b); *Rewun Persad v. Mussumat Radha Beeby* (c); *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee* (d); *Morley's Dig. tit. "Will,"* p. 616; *F. Macnaghten's "Cons. on Hindu Law,"* p. 319; *Strange's "Hindu Law,"* Vol. I., pp. 254, 262, *ib.* Vol. II., p. 16 [2nd Edit.]; *W. H. Macnaghten's "Hindu Law,"* Vol. I., p. 3, and cases in note, *ib.*, were cited. And, as to the distinction of and exceptive restrictions by the *Benares* school of Hindoo law upon a Hindoo giving or devising to one heir ancestral estate in unequal shares, *Sham Singh v. Mussumaut Umraotee* (e); *The Mitácshará*, ch. I., sec. I., pars. 27, 30; *Strange's "Hindu Law,"* Vol. I., pp. 261, 2 [2nd Edit.]; *W. H. Macnaghten's "Hindu Law,"* Vol. II., p. 147; *F. Macnaghten's "Cons. on Hindu Law,"* pp. 317-18, were relied on by the Appellant.

Upon the validity of a nuncupative Will, or gift by the Hindoo law, the case of *Crinnasammah v. Vijayammah* (f) was referred to.

As to the allowance for maintenance out of the estate to the younger branches of the family, *Chuoturya Run Murdun Syn v. Sahub Purhulad Syn* (g) was relied on.

(a) 9 Moore's Ind. App. Cases, 96; and cases cited, p. 98.

(b) 2 Moore's Ind App. Cases, 54.

(c) 4 Moore's Ind. App. Cases, 137.

(d) 8 Moore's Ind. App. Cases, 72.

(e) 2 Ben. Sud. Dew. Ad. Rep., 74.

(f) 2 Mad. H. C. Rep., 37.

(g) 7 Moore's Ind. App. Cases, 18, 52.

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Judgment having been reserved, was delivered by

The Right Hon. Sir JAMES W. COLVILE.

The subject of this appeal is the right of succession to the very considerable estate of the late *Maharajah Chutterdharee Sahee*, who died at *Hutwah* in *Zillah Sarun*, on the 16th of *March*, 1858. He was the owner of a large *Zemindary* called *Hunsapore*, which had been in the family of which he was a member for many generations before the East India Company, under the grant of the *Dewanny* in 1765, became the virtual rulers of *Bengal*, *Behar*, and *Orissa*. Like some other extensive *Zemindaries* in *Behar*, it was during that period an impartible *Raj*, and by family custom descended on the death of each successive *Rajah* to his eldest male heir, according to the rule of primogeniture, who took the whole, subject to the obligation of making to the junior members of the family certain allowances by way of maintenance called *Babooana*. The nature of the tenure, and the custom regulating its descent, were no doubt in dispute in the Courts below, but the evidence establishing them is conclusive; and accordingly they were faintly, if at all, contested on this appeal. The *Rajah* in possession of the property when the East India Company assumed the government of the Province was one *Futteh Sahee*. In consequence of his refusal to acknowledge the Sovereign or *quasi* Sovereign rights of the Company, or to pay revenue to them, a contest ensued; and about the end of 1767 he had been driven from *Hunsapore* by the Company's troops into the jungles dividing their

territories from *Goruckpore*, which then formed part of the dominions of the *Nawab Vizier* of *Oude*.

The East India Company thereupon attached the estate of *Hunsapore*, and let it out to Farmers. *Rajah Futteh Sahee*, however, from his retreat in the jungles, or in the dominions of the *Nawab Vizier*, in which he seems to have had another estate, made sundry incursions upon it, and is supposed to have killed *Govindram*, one of the Farmers under the East India Company. Soon after that occurrence there was a sort of Treaty of peace between him and the Company's Government; he was permitted to return to *Hunsapore*, and received an allowance by way of maintenance, but was not restored to the possession of the estate. That arrangement lasted only two months; he again withdrew from the Province, and renewed his predatory life on its borders. And in *May*, 1775, he attacked and murdered his own cousin, *Bissunt Sahee*, the Grandfather of *Chutterdharee Sahee*, who was then the renter or Farmer of *Hunsapore* under the East India Company. It will hereafter be necessary to consider more particularly the acts of the Government and its Officers during their possession of the estate. For the present, it is sufficient to state, that the Company retained possession of it from the date of the first expulsion of *Rajah Futteh Sahee* until 1790, either making the collections by their own Officers, or letting it out to Farmers; but in either case applying the whole of the surplus revenue to their own purposes. In 1790, however, when the Decennial settlement was in contemplation, or in the course of being made, the Government of Lord *Cornwallis* granted the property to *Chutterdharee Sahee*, then a Minor, under circumstances

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which will be more particularly considered hereafter.

Chutterdharee Sahee attained his majority in 1802. In 1837 the title of *Maharajah* was, on his application, conferred upon him by Government for the first time. He had not previously been distinguished by any title from other *Zemindars*.

The pedigree in the Appellant's case (the correctness of which is not disputed) shows that the late *Maharajah Chutterdharee Sahee* had two Sons who predeceased him. The elder of them, *Ram Sahee*, left two Sons, viz., *Ongur Pertab* and *Deoraj*, and the other, *Pritipal Sahee*, also left two Sons, viz., *Tillukdharee* and *Baboo Beer Pertab Sahee* (the Appellant). These four Grandsons were living at the time of the *Maharajah's* death, and were his co-heirs according to the ordinary Hindoo law of inheritance. *Ongur Pertab* is the Father of the Respondent, the *Maharajah Rajender Pertab Sahee*. Upon the death of *Maharajah Chutterdharee Sahee*, a contest arose as to the succession to his estate; *Deoraj*, *Tillukdharee*, and the Appellant, insisting that it descended as *ab intestato* to his four Grandsons in equal shares, according to the ordinary course of the Hindoo law; the Respondent setting up the exclusive title, which will be next stated, and *Ongur Pertab* favouring the pretensions of his Son, and relinquishing his own rights in his favour.

The title set up by the Respondent is, shortly, as follows:—

The late *Maharajah* had for several years before his death expressed his desire that his estate should descend, as the *Raj* of *Hunsapore* had up to the time of *Rajah Futteh Sahee* descended, to a single heir; and that the Respondent, in whose favour his Father had

waived whatever rights he, as the eldest male descendant of the *Maharajah*, might possess, should be that heir. Accordingly, on the 15th of *March*, 1858, being the day before his death, the *Maharajah* made, in the presence of some members of his family, including the Appellant, and a considerable number of his servants and dependents, what in these proceedings is called a consignment (*Tusleem*) of the *Raj* to the Respondent. On the same day he caused his servants to write out four *Arzis*, for the purpose of notifying this fact to the principal authorities in the District, viz., the Magistrate, the Judge, the Collector, and the Commissioner. All these documents were directed to be forwarded to *Chuprah*, the *Sudder* or principal station of *Zillah Sarun*. Early the next morning the *Maharajah* directed his servants to prepare a similar *Arzi* for transmission to the Deputy Magistrate, Mr. *Lynch*, who lived at *Sewan*, a place much nearer than *Chuprah* to the *Maharajah's* residence at *Hutwah*. Before this was done, Mr. *Lynch*, accompanied by Dr. *MacDonnell*, the Sub-Deputy Opium Agent of the District, called to pay a visit at *Hutwah*. They had an interview with the *Maharajah*, who presented the Respondent to them as his heir; recommended him to Mr. *Lynch's* protection; and told him that an *Arzi* to his address was in course of preparation, and would be forwarded. That *Arzi* accordingly varies in form from the others by introducing the circumstance of this visit. Later in the day the *Maharajah* gave what is called "*Tilluck*" to the Respondent; and afterwards caused his servants to prepare a testamentary paper, which he executed. He died somewhat suddenly about 4 P.M. of the same day.

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In these circumstances, the Respondent rests his title to succeed to the whole estate of his Great-grandfather, first, upon the several before-mentioned acts of the *Maharajah*, relying on the latest instrument as a Will, but insisting that if that be not well proven, there is *aliunde* sufficient evidence of a disposition by nuncupative Will in his favour. He contends, however, further, that the *Raj* being impartible, and descendible by custom, according to the rule of primogeniture, he, by reason of his Father's abdication in his favour, is entitled to it to the exclusion of the other members of the family, independently of any act of the late *Maharajah*. But he admits, that in either case they are entitled to have *Babooana* allowance of a proper amount assigned to them.

The contest between the parties was commenced very shortly after the death of the late *Maharajah* by those summary proceedings touching the fact of the right of possession, which are in *India* the ordinary prelude to a regular suit for the determination of a disputed title. The Respondent, on the 26th of *March*, instituted a proceeding before the Collector for the mutation of names, and this was opposed by the Appellant, and also by *Tilluckdharee* and *Deoraj*. The Respondent also instituted a summary suit in the Judges' Court for a certificate under Act, No. XX. of 1841, as to the whole estate of the late *Maharajah*, which was met by cross suits of the same nature by the Appellant, *Tilluckdharee*, and *Deoraj*, for certificates confined to their respective shares. The three last-mentioned parties also instituted two suits in the same Court, under Act, No. XIX. of 1841, for the appointment of a Curator. All these suits were decided in the Respondent's favour by the

Judge on the 22nd of *May*, 1858, and his judgments were confirmed on appeal by the *Sudder* Court in the month of *August*, 1858. And, on the 14th of *June*, 1858, the Collector, proceeding in part on the decisions of the Judge in the last-mentioned suits, granted the mutation of names for which the Respondent had applied. That Order was confirmed by the Collector on the 5th of *August*, 1858, and again by the Commissioner on the 8th of *October*, 1858. The effect of these preliminary proceedings was to put the Respondent in possession of the whole of the estate under the title set up by him, and to cast upon the rival Claimants the burthen of disputing that title in a regular suit.

Deoraj did not accept this burthen, but seems to have abandoned his claim, after making an arrangement with the Respondent for his *Babooana* allowance. The Appellant, however, and his Brother, *Tilluckdharee Sahee*, commenced the suit out of which this appeal has arisen on the 31st of *December*, 1858; but the latter, after the decrees in the Respondent's favour had been made in it, also came to an arrangement touching his allowance, and abandoned the appeal which he had contemplated. His claim, therefore, is now no longer in question; and it will be convenient to treat the suit as one between the Appellant alone and the Respondent.

The Appellant insists on the title as one of the co-heirs of the late *Maharajah*, according to the ordinary Hindoo law. He impeaches, as fraudulent fabrications in support of the Respondent's title, the Will and the several *Arzis*, or petitions, alleged to have been sent by the *Maharajah's* desire, and under his seal, to the different Civil authorities of the Dis-

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strict ; and he denies that the alleged consignment or installation of the Respondent took place. These are all questions of fact. But he further denies, as matter of law, the power of the *Maharajah* to make a Will to the prejudice of his male descendants, of whom he is one. He contends that whatever may have been the previous course of descent of the *Raj* of *Hunsapore*, according to family custom or otherwise, up to the time of *Rajah Futteh Sahee*, the law or custom determining that course of descent ceased on his expulsion ; and that the grant to *Chutterdharee Sahee* was not one of an indivisible *Raj*, descendible according to a special custom, but one of a mere *Zemindary*, governed by the ordinary law. In his case he further contended, that even had the grant been one of a *Raj*, or had the *Raj* continued in the line of *Rajah Futteh Sahee*, the special rule of succession would have been abrogated by the provisions of Regulation XI. of 1793. These points, with one or two others, to which it is not necessary now to advert, seem to have been sufficiently raised by the amended issues settled in the suit.

The judgment of the *Zillah* Judge, Mr. *Wilkins*, which was given on the 24th of *August*, 1860, found that the family custom, according to which the estate was impartible, and descended to the eldest male heir, subsisted at and up to the time of *Rajah Futteh Sahee*; that this custom was not abrogated by his expulsion, the retention of the property by the Government, and the grant of it to *Chutterdharee Sahee* ; and that the estate was in his hands an impartible *Raj*, descendible to his next male heir alone, and, therefore, on the renunciation of *Ongur Pertab*, to the Respondent. The Judge made no distinction in this respect between the movable and immovable property, and, on the

above ground, decreed in favour of the Respondent. He held, however, that the alleged consignment or transfer of the 15th of *March*, 1858, and the Will, were not well proven; and he decreed an allowance of Rs. 2,000 *per mensem* to each of the Plaintiffs, viz., the Appellant and his Brother.

The judgment of the High Court on appeal from this decree is dated the 28th of *April*, 1863. That Court also held, that the *Raj* was originally impartible, and descendible by custom to the eldest male heir alone; and that it did not lose this character on its restoration to *Chutterdharee Sahee*. It denied that there had been, or could have been, any confiscation in the proper sense of the term; and, in Mr. Justice *Levinge's* separate note, this point is more fully argued. But the High Court, differing therein from the *Zillah* Judge, affirmed the validity of the Will. It also reduced the allowance to each of the Plaintiffs to Rs. 1,000 *per mensem*.

At the close of the argument for the Appellant, their Lordships intimated, that in their opinion the judgment of the High Court, touching the *factum* of the Will, was correct, and ought not to be disturbed. They will now state their reasons for coming to that conclusion.

That the disposition was in accordance with the *Maharajah's* general wishes and intentions is shown by the strongest and most trustworthy evidence. Upon this point the concurrent and unimpeachable testimony of the witnesses, *Dampier*, Dr. *Fleming*, L. *MacDonald*, *Jhon Macleod*, W. F. *McDonnell*, *Tayler*, R. *Macleod*, and *Richardson*, being all of them European Gentlemen in the public service, or otherwise of respectable station, is to the effect, that from 1851

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up to the time of his death, the *Maharajah* continuously entertained and constantly expressed the desire to keep his property together as a *Raj*, and his intention to make the Respondent his successor and universal heir.

That he retained that desire and intention on the morning of his death, and was then in full possession of his senses, is proved beyond all question by Mr. *Lynch* and Dr. *McDonnell*. The general intention of the alleged Testator in favour of the Respondent, and his testable capacity, are, therefore, established. It is true, that in the interview with Mr. *Lynch* and Dr. *McDonnell* the *Maharajah* did not express his intention to make a Will. It is also true, that to the *factum* of the Will there is no testimony but that of his native servants and dependants. It is, however, most improbable that the *Maharajah* should have relied on what passed between him and the two European Gentlemen when none of his family, except the Respondent, and but few of his dependents, were present. And though he might also have relied on the *Tusleem* or consignation, of the preceding day as public expression of his wishes, and the formal installation of the Respondent as the new *Rajah* (supposing that ceremony to have taken place), yet it must be recollected that the question, whether the estate was impartible and descendible as a *Raj* was a doubtful one, and that he himself, as Mr. *Dampier* proves, had long known it to be so. There is, therefore, nothing improbable in the hypothesis that, pressed by this doubt, as well as urged by his strong desire to secure the succession to the Respondent, he may, even after his interview with Mr. *Lynch* and Dr. *McDonnell*, have conceived and executed the intention of making

a Will, in order to supply by the force of that instrument any defects which his preceding acts may have left in the Respondent's title. And, if the positive testimony to the execution of the document is not of a high character, it is contradicted only by that of witnesses who, swearing to the actual incapacity of the *Maharajah*, are utterly discredited by the evidence of Mr. *Lynch* and Dr. *McDonnell*; and it is not contradicted (as it might have been contradicted) by the oath of the Appellant, whom the witnesses deposing to the *Tusleem* and to the execution of the Will state to have been present on both occasions. Their Lordships are aware that the latter inference is met, as usual, by arguments founded on the unwillingness of natives of rank to appear and be examined as witnesses in a Court of Justice. There are, however, examples, increasing, fortunately, in number, of men who disregard this prejudice; and considering the vastness of the stake, and the pointed manner in which the contradiction was challenged by the witnesses on the other side, their Lordships cannot think that the failure of the Appellant to tender himself as a witness is sufficiently accounted for by the feeling in question. In any case, the fact remains, that there is no contradiction of the Respondent's witnesses, except the testimony of witnesses wholly unworthy of belief, and that the probabilities are in favour of the truth of their story. Their Lordships must, therefore, hold, that the execution of the Will has been proved; a conclusion which, though opposed to that of Mr. *Wilkins*, was also that of the Judge of First Instance and of the *Sudder* Court when dealing with the same question in the summary suits under Act, No. XX. of 1841, as well as that of the High Court in this suit.

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This being so, we have in the Will executed by the *Maharajah* a corroboration of the positive testimony as to the facts of the *Tusleem* or consignation, and of the execution and despatch of the *Arzis*, which far outweighs the arguments that have been founded on the lateness of the time at which four of the latter reached *Chuprah*. Nor do their Lordships see anything in the objection that the *Tusleem* and the execution of the Will are inconsistent acts; that if the former took place, the *Maharajah* had nothing to dispose of, and the Will was superfluous. Their Lordships look upon the events of the last two days of his life as a series of acts, of which the execution of the Will was the crowning one, all being designed by the *Maharajah* to effectuate, so far as his acts legally could, his intention to leave his estate as a *Raj*, and to make the Respondent his successor.

It is unnecessary for their Lordships to give any opinion upon the question raised in the Courts below of a disposition in favour of the Respondent by nuncupative Will. They will only remark, that they would have had much difficulty in supporting his title on that ground upon the pleadings and evidence in this suit. There was great confusion in the Courts below on this point. The Respondent seems at one time to have relied on the *Tusleem*; at another on what passed between the *Maharajah* and Mr. *Lynch* as a nuncupative Will. But if any party is bound to strictness of pleading, it is he who sets up a nuncupative Will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.

Having thus determined to principal issues of fact on this appeal, their Lordships have now to consider, whether the *Maharajah* had by law the power to make the Will which he did make; and also by what law the succession to his property, and especially to that portion of it which formerly constituted the *Raj* of *Hunsapore*, is to be regulated if he had not the power to devise it.

In order to determine either of these questions, it is material to ascertain what was the nature of the estate or interest which *Chutterdharee Sahee* acquired through the acts of the East India Company's Government in 1790. And for that purpose it is necessary to go more particularly into the history of the estate after the expulsion of *Rajah Futteh Sahee*.

It has already been stated that, after that event, the property was for nearly twenty-three years hold by the East India Company, who, whether they let it to Farmers, or kept it under their own management, applied the whole of the surplus revenue to their own use. During great part of that period, *Rajah Futteh Sahee* continued to wage war with them from his retreat in the jungles, or in the territories of the *Nawab Vizier*, and appears to have been consistently treated by them, at least after 1773, as a public enemy, with whom no terms should be made.

The murder of *Bishunt Sahee* took place, as before stated, in 1775. In 1778 the Revenue Council of *Patna*, on the application of *Mohesh Dutt*, the son of the murdered man, and the Father of *Chutterdharee Sahee*, proposed that *Rajah Futteh Sahee* should be declared to have forfeited his *Zemindary*, and that it should be bestowed on *Mohesh Dutt*, but the Government of *Warren Hastings* declined to comply

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with that proposal, or to do more at that time than hold out vague hopes of reward to *Mohesh Dutt* for his fidelity.

In 1784 the claims of *Mohesh Dutt* were again under the consideration of Mr. *Hastings'* Government. The proceedings that took place clearly show, that it was then considered that any grant to him, though he founded his claim on being the next heir to the *Zemindary* after the extinction of *Rajah Futteh Sahee's* line, was matter not of right but of favour; and that it was actually proposed to insert in the *Sunnud* by which any such grant should be made, a condition for avoiding it in case the Grantee should, by negligence or from any cause unsatisfactory to Government, fail to deliver up the person of *Rajah Futteh Sahee* within one year. Ultimately nothing was done on this application; *Mohesh Dutt* afterwards died, and the estate remained as before in the hands of the East India Company.

In 1790, the question what should be done with it came before the Government of Lord *Cornwallis*, in consequence of the steps which were then being taken in order to effect the Decennial settlement. On the 16th of *June* in that year the Collector, Mr. *Montgomerie*, having received instructions for the disposal of all lands "the immediate property of the Company," wrote to inform the Board of Revenue that there were no lands within his District which answered that description, unless they were this *Zemindary* and another somewhat similarly circumstanced. On the 21st of *July* in the same year, the Board of Revenue submitted this Letter to Government, with a recommendation that such part of *Hunsapore* as was the property of *Rajah Futteh Sahee* should be declared con-

fiscated, and sold subject to the interests of the existing Farmers. But on the 28th of *July* the Government, in answer to this communication, directed "that such part of *Hunsapore* as was stated by the Collector to have been the real property of the rebel, *Rajah Futteh Sahee*, should be conferred on the infant Son of the late *Mohesh Dutt*, after the usual publication had been made." That Letter also provided, that upon the lands being finally confirmed to the Son of *Mohesh Dutt*, he should receive the allowance fixed for disqualified landholders.

The Collector having, on the 18th of *November*, 1790, reported that "no admissible claim had been preferred to the lands ordered to be confirmed to *Chutterdharee Sahee*," the Board of Revenue, on the 17th of *January*, 1791, recommended that *Chutterdharee Sahee*, the infant Son of *Mohesh Dutt*, should be "declared proprietor of the land in *Hunsapore*, which belonged to *Futteh Sahee*," and the Government, on the 21st of *January*, ordered accordingly.

A subsequent Letter of the Board of the 29th of *April*, 1791, fixes the *Malikana* allowance for the infant at S. Rs. 1,027. 7a. 4p. *per mensem*, and makes it payable from the 11th of *October*, 1790.

In *October*, 1802, *Chutterdharee Sahee* having come of age, entered into a formal engagement for the payment of the Government Revenue; and the revenue Officers who had managed the estate during his minority, relinquished it to him and issued a proclamation directing the *Ryots* and tenants to pay the collections to him. These documents, called respectively the *Dowl* and the *Amuldustuck*, are set out in the record, but they do not throw much light upon any of the questions raised in the suit.

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It is material to observe, that during all these proceedings, *Rajah Futteh Sahee* and his line continued to exist, and that the latter exists to this day. He himself was alive in 1808, but had then become a *Fakeer*, having given up even his *Goruckpore* property to his family. In 1790 his Wife and one of his Sons appealed to Government for an allowance, but their application was rejected on the 25th of *June* in that year. In *April*, 1792, one of the Sons, and in *April*, 1808, four of the Sons of *Rajah Futteh Sahee* made applications for the restoration of the estate, and for allowance out of it. On the 29th of *April*, 1808, the latter application was rejected by Government in a Letter which stated that "the estate of *Futteh Sahee* had been forfeited to Government." *Areemurda Sahee*, one (and apparently the eldest) of the four Sons, made similar claims by petition in 1816, and again in 1821. In both these petitions he stated, that his younger Brother had come forward before Mr. *Montgomerie* in 1790 claiming, on behalf of *Rajah Futteh Sahee's* line, to settle for the revenue. The claim, if made, was clearly treated as inadmissible. The Order indorsed on the petition of 1821 is to the effect that, "whereas the property of *Futteh Sahee* was confiscated on account of rebellion," no further proceedings on the petition are necessary. In *June*, 1829, the Great-grandson of *Rajah Futteh Sahee* brought a regular suit against *Chutterdharee Sahee* and the Government for the recovery of the estate, which was dismissed on the simple ground that the claim was barred by the Regulation of Limitations. And the same persons seem to have appeared on the proceedings before the Collector of the 14th of *June*, 1848, which is above referred to, alleging that the grant to *Chut-*

terdharee Sahee was for life only, and again setting up his own title as the descendant and representative of *Rajah Futteh Sahee*.

On these facts, it is at least clear, that there was a virtual confiscation of the interest of *Raja Futteh Sahee* and his descendants in the property, and the assertion of full dominion over it on the part of the East India Company. The Government has not only persistently treated the estate of *Raja Futteh Sahee* as forfeited, and refused to recognize any claim on the part of his descendants ; it has for more than twenty years applied the revenue to its own purposes ; it held itself at liberty either to reject (as it ultimately rejected) the applications of *Mohesh Dutt*, or to make a fresh grant of the estate to him, imposing new conditions upon the tenure ; it held itself at liberty in 1790 to dispose of the property by sale, though as a matter of grace and favour it finally conferred it on *Chutterdharee Sahee*.

Their Lordships are, therefore, unable to see the force of the argument which the Judges of the High Court, and in particular Mr. Justice *Levinge*, have founded upon the supposed obligation of the East India Company to govern the Provinces which they held under the Mogul Emperor by virtue of the grant of the *Dewanny* according to Mahomedan law, and upon the doctrine of that law which denies to the ruling power the right to confiscate the property of a rebel. Such an argument might, perhaps, have been plausibly urged in the suit which the Great-grandson of *Rajah Futteh Sahee* brought against *Chutterdharee Sahee* and the Government, if that had ever come to a hearing. In this suit, however, both parties claim under *Chutterdharee Sahee* ; and as between

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them, and for the purposes of this suit, it must be taken for granted that he derived his title (whatever may have been the nature of his estate, or the incidents to it) by grant from the East India Company, which had full dominion over the estate, and, therefore, the power to grant it.

One consequence from this conclusion (and it has a material bearing on the question of testamentary power) is, that the estate must be taken to have been the separate and self-acquired property of *Chutterdharee Sahee*. The fact that he was the member of the family which had so long held the estate, next in succession to the line of *Rajah Futteh Sahee*, and the Son and Grandson of persons who had established claims on the gratitude of the Company, may have been a motive determining the selection of him as Grantee; but it does not affect the nature of his estate, or give to it the character of ancestral property. The legal foundation of his title is still the grant to him from those who had power to make or to withhold it. This point was ruled in the *Shivagunga* case (9 Moore's Ind. App. Cases, 606).

The question remains, what was the nature of the estate granted, whether it was a fresh grant of the family *Raj* with its customary rule of descent, or a grant of the lands formerly included in that *Raj* to be held as an ordinary *Zemindary*.

There was not in this, as in the *Shivagunga* case, a new *Sunnud*. We have no evidence of the intention of the Grantors except that which is to be collected from the proceedings and correspondence already referred to, nor have we any record of the proceedings before the Governor-General, or any means of knowing the precise grounds on which Lord Corn-

wallis's Government rejected the recommendation of the Board of Revenue, and determined to confer the property on *Chutterdharee Sahee*. Again, it cannot be denied, that in these proceedings the term "*Raj*" is never used, or that in some of them the subject of the grant is spoken of as "the land in *Hunsapore* which belonged to *Rajah Futteh Sahee*." On the other hand, there is no expressed intention to alter the nature of the tenure. The estate, whilst it was in the hands of the Company, had never been broken up. The policy of the Decennial settlement was to form a body of landholders by ascertaining in whom the *Zemindary* interest in the soil actually was, and making with those persons a Permanent settlement of the Government revenue, so as to give them greater fixity of tenure. Lord *Cornwallis's* Government determined to set up *Chutterdharee Sahee* as the *Zemindar* with whom the Settlement in respect of this property should be made. But the estate of a *Zemindar* was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependent *Talookdars*, or other under-tenants, *Ryots* of various classes, and others; and the Decennial settlement, as a reference to the Rules re-enacted by Regulation VIII. of 1793 will show, proceeded upon an inquiry into all or many of these particulars. In the absence of all evidence to the contrary, it must be presumed, that the Settlement was made precisely as it would have been made had the estate continued in the line of *Rajah Futteh Sahee*; and, therefore, that the subject conferred on *Chutterdharee Sahee* was the old *Zemindary* with all its incidents, excepting, at most, its descendible quality. It seems to follow, that the

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intention to alter that quality, if it existed, would have been expressed. Again, the selection of a member of the old family, the next in succession to the excluded line, though it cannot make ancestral that which was self-acquired, is a very strong circumstance in favour of the hypothesis, that the intention of Government was to restore the *Zemindary* as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of *Rajah Futteh Sahee* and his descendants, and in the substitution, by an act of power, of the person next in the order of succession, and consequently that the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*.

The circumstance that the grant was in the first instance of the *Zemindary* without the title of *Rajah* has been urged as a strong argument in favour of the Appellant's view of the case. But that the title was not absolutely essential to the tenure of the estate as a *Raj* is shown by the *Tirhoot* case (6 Moore's Ind. App. Cases, p. 191); and in 1837 the title was conferred on *Chutterdharee Sahee* upon his application, founded on the fact, that it had been enjoyed by his predecessors, and annexed to the *Zemindary*. This act of the Government in 1837 could not alter the legal effect of what was actually done in 1790; but the grant of the title on this representation at least shows that the Government of 1837 did not dissent from the construction which *Chutterdharee Sahee* then put upon the acts of their predecessors in 1790.

Another argument for the Appellant is founded on Regulation XI. of 1793. Mr. *Field* does not contend, in the face of the authorities cited by Mr.

Leith, that if the estate granted to *Chutterdharee Sahee* in 1790 was a *Raj*, descendible by family custom, according to the rule of primogeniture, it lost that character on the passing of the Regulation in question; but he insists on that Regulation as evidence of intention. He argues that, inasmuch as it was passed to reduce the number of estates descendible by special custom, the intention of Lord *Cornwallis's* Government was, presumably, to make the property restored to *Chutterdharee Sahee* subject to the ordinary law of succession.

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Their Lordships, however, are of opinion, that they cannot safely draw any inference concerning the intentions of Government in making a particular grant in 1790, from the passing in 1793 of a general law which, confessedly, does not affect the descent of the large *Zemindaries* held as *Raj*, or subject to *Kooloochar*, or family custom.

Upon the whole, then, their Lordships have come to the conclusion, that the Courts below were right in holding that the estate granted to *Chutterdharee Sahee* in 1790 was the *Raj* of *Hunsapore*, and that the right of succession to it from him was to be governed by the law or custom which regulated its descent in the time of his ancestors.

This view of the case removes many of the objections to the testamentary power of the late *Maharajah*, which it is nevertheless necessary to consider, since the title of the Respondent to at least part of *Chutterdharee Sahee's* estate may depend on the Will.

It is too late to contend that, because the ancient Hindoo Treatises make no mention of Wills, a Hindoo cannot make a testamentary disposition of his pro-

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perty. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation, by gift *inter vivos*. Accordingly, it has been settled that even in those parts of *India* which are governed by the stricter law of the *Mitácshará*, a Hindoo without male descendants may dispose, by Will, of his separate and self-acquired property, whether movable, or immovable; and that one having male descendants may so dispose of self-acquired property, if movable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. It is, however, objected that a Hindoo in those Provinces who has Sons or other male descendants must, on the application of the doctrine in question, be held to be incapable of making by Will an unequal distribution amongst them of immovable property, whether self-acquired or ancestral; because by the law of the *Mitácshará* his Sons in both cases take, on their birth, an interest in the property, which their Father without their consent cannot displace.

For the Respondent it is contended, that this question is concluded by the *Bithoor Case* (9 Moore's Ind. App. Cases p. 96). It cannot be denied that in that case, the Testator being a *Mahratta*, domiciled at *Cawnpore*, and having real as well as personal estate, made by Will an unequal distribution of both amongst his Sons; and that his legal power to do so was affirmed by this Committee, and by both the Courts below. The Appellant, however, insists, that this decision is opposed to the law of the school of *Benares*, and relies on the texts of the *Mitácshará*, which show, that a Father cannot alienate his self-

acquired estate, or make an unequal distribution of them by partition, without the consent of his Sons; and also upon passages in *Strange's "Hindu Law,"* and other authorities. Mr. *Leith*, on the other hand, has argued, that all these authorities are to be reconciled with the decision in the *Bithoor* Case, by holding, that they relate to property acquired by the Father, with the use or by the aid of ancestral estate; and that they have no application to separate any self-acquired property in the strict sense of the term. Their Lordships are relieved from the necessity of determining whether this distinction is well founded, or whether, if it be not so, the present case must be governed by the *Bithoor* Case. For if they are right in holding, that the grant was of a *Raj* descendible, according to custom, to the eldest male heir, the question, whether, according to the law of the *Benares* school, a Hindoo can by Will make an unequal distribution of his self-acquired immovable property amongst his male descendants without their consent, does not in this case arise. The only person entitled to impeach the disposition by Will is *Ongur Pertab*, the eldest Grandson, who is a consenting party to it: There are no inchoate rights of inheritance in the junior members of the family. They did not by birth acquire that community of interest with their Grandfather in his self-acquired lands which is the foundation of the supposed restriction on his power. And, *cessante ratione cessat et ipsa lex*. (See the remarks of Sir *William Macnaghten* on the case of *Esachund Rai v. Eshorcund Rai* (1 Ben. Sud. Dew. Ad. Rep., 2), 1 *W. H. Macnaghten's "Hindu Law,"* p. 7).

It follows, then, that either by the special law of

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inheritance, or by the Will, the Respondent was entitled to the estate of *Hunsapore*, and to whatever other wealth the late *Maharajah* could dispose of by his Will.

Mr. *Field* has objected, that this ruling does not cover that portion of the estate (if any) which came to *Chutterdharee Sahee* from his Father, *Mohesh Dutt*. This may be true, but their Lordships are of opinion, that the pleadings and evidence in this suit do not properly raise such a case, and utterly fail to show what that property (if any) was. And the Respondent being in possession of the whole, it was for the Appellant, if he failed to establish his title to share in the whole, to show in what part he was entitled to share.

With respect to the questions raised by either appeal touching the amount of the *Babooana* allowance, and the costs of the proceedings in the Courts below, their Lordships have only to say, that they see no sufficient ground for interfering with the discretion exercised on those points by the High Court. The result is, that their Lordships will humbly advise Her Majesty to dismiss both the appeal and the cross appeal with costs. The Appellant and the Respondent will each bear the costs of his appeal.

BISSONAUTH CHUNDER and others ... *Appellants* ;

AND

SREEMUTTY BAMASOONDERY DOSSEE }
and others ... } *Respondents.**

On appeal from the Supreme Court at Calcutta.

IN this suit the question turned upon the construction of the Will of *Ramtonoo Chunder*, a Hindoo. The point raised being, whether the Plain-

13th & 16th,
Dec., 1867

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Romilly (The Master of the Rolls), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

A Hindoo Testator by his Will, directed, that his five Sons, continuing joint in food, should take care of his property and carry on his

business, and that on the death of any one of his Sons, "not leaving Sons and leaving Daughters," that the Daughters should receive a certain sum out of the estate, and in the event of any one of his Son's Widows continuing in the family, provision was made for her maintenance; but if the Widow should leave the family, she was to receive the sum of Rs. 2,000 out of the Testator's real and personal property. After the Testator's death, the five Sons lived together and carried on their Father's business, without any partition taking place. One of the Sons died, leaving a Widow and Daughters. Held, upon the construction of the Will (1), that the five Sons took an absolute estate in the property, and (2), that on the death of one of the Sons, his share in the *corpus* did not go to his Widow, but (3), that his share of the accumulations was not affected by the Will, and passed to his Widow by descent.

Held, further, that in the event, which happened, of one of the Widows leaving the family, she was entitled to Rs. 2,000, independently of her Husband's share in the accumulations.

In the absence of any direction to the contrary, it is the rule of Hindoo law that accumulations go with the capital.

The partnership property consisted in part of Company's paper, which was indorsed in blank by the deceased Son of the Testator shortly before his death, and handed over by him to his Brothers. Held, that it was a mere ordinary partnership transaction, for the purpose of carrying on the business, and that they formed part of the partnership assets, in which the deceased Son was entitled to share after the expenses of the partnership were discharged.

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tiff, as the Widow of *Muddoosoodun Chunder*, a Son of the Testator, was entitled to her Husband's share of the *corpus* of his Father's estate, and if not then, whether she was entitled to her Husband's share of the accumulations which accrued from the estate between the date of the death of the Testator, the Father of her late Husband, and the death of *Muddoosoodun Chunder*, his Son. The Plaintiff's case was, that under the Will of the Testator, hereinafter set out, she was entitled to her deceased Husband's share of the *corpus*. On the part of the Defendants it was contended, that she was not entitled to anything beyond the sum of Rs. 2,000, bequeathed to her by the second paragraph of the Testator's Will.

The facts were these :—

Ramtonoo Chunder, a Hindoo resident in *Calcutta*, died in the year 1836, leaving five Sons, named *Nilmoney Chunder*, *Goluckchunder Chunder*, *Gocoolchunder Chunder*, *Muddoosoodun Chunder*, and *Bissonauth Chunder*, having previously made a Will.

The important passages in the Will (which was in *Bengalee*) were the following :—

“ I am of advanced age, in ill health, considering the body perishable. My ancestral and self-acquired, whatever real and personal property, and trading business and dealings, that there are the same after my death, my five Sons, the eldest, *Sri Nilmoney Chunder*, the second, *Sri Goluckchunder Chunder*, the third, *Sri Gocoolchunder Chunder*, the fourth, *Sri Muddoosoodun Chunder*, the fifth, *Sri Bissonauth Chunder*, whatever these shall obtain and continue possessed of, and the *Dabee* services, the acts, ceremonies, &c., and to whomsoever whatever I intend to give, I direct the same in the following written paragraphs :—

"First paragraph.—My five Sons, the eldest, *Sri-Nilmoney Chunder*, and second, *Sri Goluckchunder Chunder*, and the third, *Sri Gocoolchunder Chunder*, and the fourth, *Sri Muddoosoodun Chunder*, and the fifth *Sri Bissonauth Chunder*, these, after my death, all continuing joint in food being unanimous, will preserve and look after my real and personal properties, &c., and business, trading business, &c., whomsoever, whatever there are the same, they will carry on conformably to the directions hereinafter written, they will perform the daily usual acts, &c., should they disagree and wish to separate, then deducting my real and personal properties and business, trading business, &c., they shall be unable to make and take a partition and division and demarcation, on account of my regulated acts, ceremonies, &c., and family expenses, and the profits and losses of the trading business, and after deducting the establishment charges, the surplus proceeds, the money that shall remain out of the same they will receive their respective shares.

"Second paragraph.—From amongst my aforesaid Sons, God forbid should any die without Sons, that is, die not leaving Sons, and leaving Daughters, and leaving a Wife; then the said Son's Daughters, each of them, will receive Rs. 100; and should his Widow continue in the family then, whenever whatever *brito neom* acts, ceremonies proper, that she perform, the expenses for the same she shall receive from my estate; should she be disobedient, and not remain in my House, depart, or live elsewhere; or, should she not wish to continue in the family, then the said Widow woman shall receive Rs. 2,000, on my real and personal properties, business, trading

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business, and properties, &c., she will be unable to make a claim or demand to her Husband's suitable share; and if, in like manner, the Son's Daughters have Sons born, then the said Sons, each person, will receive Rs. 200."

"Ninth paragraph.—From amongst my Sons, whenever whatsoever shall be the elder, under his direction all the business shall be performed, I hereby appoint the above five Sons the *Turney* of this my Will."

After his death his Sons, without proving their Father's Will, lived together in the usual way as a joint Hindoo family, carrying on their Father's business of Iron and Brass Founders.

Muddoosoodun Chunder, one of the Sons, married the Respondent, *Sreemutty Bamasoondery Dossee*, in 1847, and died soon afterwards intestate, leaving her, then only about eleven years of age, his sole Widow and heiress. He had no son, but left two Daughters by a former marriage.

Part of the co-partnership assets consisted of Company's paper, which *Muddoosoodun Chunder*, before his death, indorsed in blank and transferred to his four Brothers.

Another Son of the Testator, *Goluckchunder Chunder*, died in *September*, 1851, intestate, without any issue, leaving two Widows, the Appellants, *Bermomoye Dossee* and *Comulmoney Dossee*.

Towards the end of the year 1855 the Respondent, *Sreemutty Bamasoondery Dossee*, who had left her Husband's relations and gone to the house of her Father and who was ignorant that *Ramtonoo Chunder* had left a Will, filed a Bill in the Supreme Court against his three then surviving Sons and the

Widows of *Goluckchunder Chunder*, claiming one-fifth of *Ramtonoo Chunder's* estate, on the ground of his having died intestate. The surviving Sons, by their answer, set up as a defence, that *Ramtonoo Chunder* had made the above Will, and the Respondent's Bill was, therefore, on the hearing, dismissed with costs, and the decision was affirmed on a rehearing. Another suit was instituted by her, but abandoned for want of means to carry it on.

The Respondent then instituted the present suit. In her Bill of Complaint she set out the above-mentioned Will, and stated, in substance, that the Brothers remained joint without effecting any partition, and that the income greatly exceeded the expenditure, and that there had been a large increase to the estate between the time of the death of *Ramtoonoo Chunder* and *Muddoosoodun Chunder*, and that all the estate and increase had come into the possession of his surviving Brothers, and that they had made large profits thereout; and after setting up the different legal views that might be taken of her position, prayed to the following effect:—First, to have the Will established and her rights declared; second, if the Court should think her entitled to her Husband's share of the whole estate, then for an account and partition, and for allotment to her of one-fifth of the whole; third, if the Court should not so think, then for a declaration that her Husband, taking under the Will a vested interest in one-fifth of his Father's estate, became absolutely entitled to one-fifth of the accumulated income of the joint estate, and additions thereto, from the time of his Father's death to his own death, and that the Plaintiff, as his Widow and heiress, was entitled to the whole thereof;

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fourth and fifth, for the necessary accounts and Orders for payment, in the event of the Court giving such relief as sought by the third paragraph of the prayer; sixth, if the Court should not grant either of these prayers, then in the alternative for maintenance and religious expenses, and a reference to ascertain the amount; the seventh, eighth, and ninth, were the usual prayer for admission of assets, a Receiver, and further relief.

The Defendants, *Nilmoney Chunder*, *Gocoolchunder Chunder*, and *Bissonauth Chunder*, filed a demurrer, plea, and answer. The ground taken by the demurrer was that, under the Will of *Ramtonoo Chunder*, the interest of *Muddoosoodun Chunder*, in his estate, was liable to be divested, and did in fact become divested upon his dying without a Son and leaving a Daughter; and that the Plaintiff had no right to anything save her expenses, if she remained in the Testator's family, and in the sum of Rs. 2,000 if she left; and also that, as the Sons were joint up to the death of *Muddoosoodun Chunder*, and no partition had taken place, his right to the accumulations or increase was divested by his death. By the plea they set up the fact, that the Plaintiff had left the house, as a defence to any claim for maintenance or account; and by the answer the Defendants admitted, that the sum of Rs. 2,000 was due to the Respondent, *Sreemutty Bamasoonery Dossee*, but claimed a set-off for the costs of the two former suits.

The answer of the other Defendants put the Plaintiff to the proof of the several facts stated in the Bill, and referred the questions of law to the judgment of the Court.

On the 26th of *September*, 1859, the demurrer came

on for argument before the full Court, and was overruled, with costs, the Defendants being ordered to answer.

The other Defendants filed their answer, by which, while raising the same points of law as already taken, they disputed several of the allegations in the Bill as to the expenditure of income.

The Plaintiff joined issue on the answers. The cause became abated by the death of *Sri Gocoolchunder*, and was revived against his Widow, *Sreemutty Kantomoye Dossee*.

The cause was heard before the Chief Justice, Sir *Barnes Peacock*, and the Justice, Sir *Charles Jackson* and Sir *Mordaunt Wells*. The material part of the judgment by the Chief Justice, which was sent with the Record, as the reasons of the Court, was in these terms:—"The Will of *Ramtonoo Chunder* is ambiguously worded, but we think it clear, from the second paragraph, that it was the intention of the Testator, that if any of his Sons should die without leaving Sons (the last word 'Sons' probably including Grandsons and Great-grandsons in the male line), his Widow should not take his share of the *corpus* of the estate, and that neither his Daughters nor his Daughters' Sons should take it—for provision is expressly made by that paragraph both for the Widow and Daughters of such Son and for the Sons of such Daughters. There is no express gift over of the *corpus* of the estate in the event of any of the Sons of the Testator dying without leaving Sons, as there was in the Will of *Bostomdoss Mullick*, which formed the subject of the dispute in the case of *Sreemutty Soorjeemonee Dossee v. Denobundoo Mullick* (6 Moore's Ind. App. Cases, p. 526); but we think it clear, that it was the

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intention of the Testator, that if any of his Sons should die 'without leaving Sons,' the Widow and Daughters and Daughters' Sons should not inherit the Son's share of the estate which he took under his Father's Will. It was contended, on the part of the Plaintiff, that the Sons took merely a life estate under the Will, and an absolute estate in the reversion, which was undisposed of by the Will, by descent. We are of opinion, however, that they did not take merely a life estate under the Will, and are inclined to think that they took an absolute estate in the property which belonged to the Testator at the time of his death, the estate of each Son being defeasible and going over to the next heirs of the Testator in exclusion of the Widow, Daughter and Daughters' Sons, or such Son of the Testator's dying without leaving a Son or a Grandson, or a Great-grandson in the male line at the time of his death—for in the case of Hindoos there is no distinction between real and personal estate—and the declaration that the Widow would be unable to make any claim or demand to her Husband's suitable share in the event of his dying leaving no Sons and leaving a Widow, shows that the words 'From amongst my aforesaid Sons, God forbid should any die without Sons, that is, die not leaving Sons,' applied strictly to the Sons of the Testator described in the first paragraph of the Will, and were not intended to refer to an indefinite failure of male issue of the body of such Son. It is not necessary, however, to determine what estate the Sons took under the Will. We think it clear, that they did not take any estate under the Will, either in possession or reversion, inheritable by their Widows in the event of their dying without leaving Sons.

This, however, applies to that which was the subject of the devise, and not to the accumulations. They formed no part of the estate of *Ramtonoo Chunder*, they had no existence at the time of his death, and were consequently no part of the property which he could devise or which he intended to devise by his Will. Upon this point we think, that the decision of the Privy Council in the case above alluded to is clear, and we cannot draw any substantial distinction between that case and the present one in this respect. The second paragraph says, 'From amongst my afore-said Sons, God forbid should any die without Sons, &c.,' she (meaning the Son's Widow) will be unable to make claim to her Husband's suitable share. This shows that the Testator intended that each of his Sons was to take a share which, but for the second paragraph, would descend to his Widow. It was contended in argument, that the Sons were prohibited, by the first paragraph of the Will, from making partition, and consequently that the increment followed the principal. But it was clearly pointed out in the judgment of Lord Justice *Turner*, in the case to which we have referred (6 Moore's Ind. App. Cases, p. 553), that, 'admitting the family to have been joint, and the Sons joint in estate, the right of any one of the co-sharers would not, under the Hindoo law, pass over, upon his death, to the other co-sharers; it would be part of the estate of the deceased co-sharer, and would devolve upon his legatees, or his natural heirs.' Admitting, therefore, that the accumulations became joint estate, the share of such accumulations belonging to each Son would in ordinary course pass to his natural heirs, unless there is something in the Will to prevent it.

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In the case of *Muddoosoodun Chunder*, the Plaintiff, his Widow, was his heir. The authority already cited shows that the Will, although it operated upon the *corpus*, did not operate upon the accumulations, although they accrued whilst the *corpus* remained joint. It also proves, that the rule of Hindoo law, that the increment follows the principal where the parties are joint in estate, cannot be carried to this extent, that the accumulations must go wherever the principal goes, for in that case the principal went over to the surviving Sons by the Will, whereas the deceased Son's share of the accumulations passed to his Widow by descent. It must be admitted, that in the case cited, the Testator did not, as in this case, impose the obligation that the Sons should not make partition of the *corpus*, but in that case, although the Sons were not prohibited from making partition, they did not in fact divide the estate, and we are unable to see what difference the prohibition made, when in fact, as in the present case, there was no partition. It should also be remarked, that in the present case, so far from there being a prohibition from dividing the accumulations, which are now the only subject of consideration, the Sons were expressly authorized to divide them. The first paragraph clearly contemplates that the Sons might make partition of something. It says, 'Should they disagree and wish to separate, then deducting my real and personal properties, business, trading business, &c., they shall be unable to make and take a partition and division and demarcation on account of my regulated acts, ceremonies, &c., and family expenses, and the profits and losses of my trading business, and after deducting the establishment charges, the surplus proceeds of the money

that shall remain out of the same they will receive their suitable shares.' As we read this part of the Will, we think, that it was the intention to exclude the *corpus* from partition 'on account of' the Testator's regulated acts and ceremonies, &c., in other words, that the *corpus* should remain entire for the purpose of making provision for his regulated acts, religious ceremonies, family expenses, and any losses of business. This would be clear if the word 'thereof' had been inserted after the word 'demarcation,' and the word 'losses' alone had been used instead of the 'profits and losses' of the trading business, &c. To use the Testator's words, 'my real and personal properties and business,' &c., that is to say, the *corpus* of the estate, were to be deducted or set apart, and not to become the subject of partition; the establishment charges were also to be deducted from the receipts, and then the 'surplus proceeds,' 'or the money that shall remain,' were to be divided, and each Son was to take a share. It is not necessary to determine whether, upon the death of one of the Sons leaving Sons, his Sons would have been precluded from demanding a partition of the *corpus*, as that question does not arise in the present case. The reason why the Widow did not take the *corpus* is, that she was expressly excluded by the Will from inheriting from her Husband that which was the subject matter of the devise. The rule of Hindoo law which says, that the increment follows the principal, does not apply to prevent the Plaintiff from taking her Husband's share of the accumulations, if we are correct in holding, upon the authority of the case above referred to, that the Will did not operate upon the accumulations, and that the rule of Hindoo

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law did not so far connect the increment with the principal as to make the Will, by construction, operate upon those accumulations which had no existence in the lifetime of the Testator, or convert them into part of his estate. If the Sons in their lifetime had severed in estate, and they were not prohibited from so doing, so far as the accumulations were concerned, the accumulations in respect of each Son's share would have belonged to the owner of that share, according to the principle laid down by the Privy Council before cited (6 Moore's Ind. App. Cases, p. 554); and there is neither any express declaration nor any necessary inference from which it can be inferred that the Testator intended that the Sons might divide, and that each Son might take his share of the accumulations if they chose; but that if the Sons should continue joint, their shares of that which did not exist at the time of the Testator's death should go, wherever the *corpus* of his estate should go, either as part of the subject matter devised by his Will, or as part of his estate. We doubt whether, if such an intention were clear, the law would give force to it, for it would be an intention to control by Will that which had no existence in the Testator's lifetime. To use the words of the Privy Council, 'Equality among the heirs is, as we understand, the spirit of the [Hindoo] law. The law does not treat the principal and the increment as undistinguishable in their nature, for there is no doubt they may be severed; but it treats them as united for the purpose of dividing them equally amongst all the united family, that is, amongst all the heirs; and if that entire quality cannot, as in the present case in consequence of the disposition of the Will it cannot, be obtained, the

partial attainment of it seems to us to be more in the spirit of the Hindoo law, than its total rejection' (6 Moore's Ind. App. Cases, 555). Upon the authority, then, of the above case, we are of opinion, that in consequence of the disposition of the Will, *Muddoosoodun Chunder's* share of the *corpus* did not pass to his Widow upon his death without leaving a Son, but that his share of the accumulations was not affected by the Will, and, therefore (according to the ordinary rules of descent adopted by the Hindoo law), passed to his Widow, there being no precept of Hindoo law which prohibits accumulations from being severed from the principal, and requires that whenever the former goes, the latter must go likewise. If the Sons had divided the accumulations in their lifetime, being prohibited from dividing the *corpus*, there would necessarily have been a separation of the increment from the principal. We are further of opinion, that the Widow, having ceased to continue in the family, is entitled to recover the Rs. 2,000, as directed by the second paragraph of the Will, instead of receiving the expenses of the acts and ceremonies proper for her to perform. This sum she is entitled to under the Will of the Testator, independently of what she inherits from her Husband. It is, therefore, no more affected by her having succeeded to her Husband's share of the accumulations which formed no part of the Testator's estate, than it would have been by her succeeding to any part of her Husband's self-acquired property, or by her having succeeded to his share of the accumulations if he had separated from his Brothers in his lifetime, and had taken his share of the accumulations under the provisions of the first paragraph of the


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Will under a partition completed a few days before his death. The *corpus* of the estate, and not the accumulations, was the property charged with the family expenses, including the acts and ceremonies to be performed by the Widow if she remained in the family. She is, therefore, in our opinion, entitled to the Rs. 2,000, as well as to her Husband's share of the accumulations. All question of incontinence on the part of the Widow was abandoned by the Defendants at the trial. As the Widow was entitled to her Husband's share of the accumulations immediately upon his death, she is entitled to any profits which may have been realized in respect of such share. Her Husband's share of the accumulations she takes by descent from him, and she will, therefore, hold it as a Hindoo Widow in the manner prescribed by the Hindoo law. The Rs. 2,000 she takes under the Testator's Will, and not by descent from her Husband. She was entitled to receive that amount from the time at which she left the family dwelling-house, and she is, therefore, entitled to interest thereon from that time at the rate of six per cent. It must be referred to the Master to take the necessary accounts."

The decree founded on this judgment was to the following effect :—First, it declared the Will of *Ramtonoo Chunder* well proved, and ordered the same to be established, and the trusts thereof carried out. Second, it declared that the Respondent was not entitled to succeed to her deceased Husband's share of the property which his Father left at the time of this death; and, thirdly, it declared, that "*Muddoosoodun Chunder* was entitled absolutely to one-fifth of the accumulations and increase (if any) of

the joint property, movable and immovable, which accrued from the time of the death of the Testator down to the time of the death of *Muddoosoodun Chunder*; and that the Plaintiff, as such Widow and heiress of *Muddoosoodun Chunder*, became, on the death of *Muddoosoodun Chunder*, and was entitled to such one-fifth share of the accumulation and increase, and also to the gains and profits, if any, which have accrued upon, or in respect of, the one-fifth share of the accumulations and increase, or which have been made or realized by the use thereof since the death of *Muddoosoodun Chunder*, the same to be held, possessed, and enjoyed by her as a Hindoo Widow. Fourth, it also gave her absolutely the legacy of Rs. 2,000, with interest; and, fifth, it referred the cause to the Master to take the accounts of accumulations, increase, and profits, and all necessary accounts for carrying out the decree.

The appeal was from this decree.

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellants.

According to the true constructions of the Will, having regard to the incidents of property in the possession and enjoyment of a joint and undivided Hindoo family, the Plaintiff, as the Widow and legal representative of her deceased Husband, a member, at the time of his death, of a joint family, was not entitled to claim any share in the undistinguishable and unseparated increment formed of the surplus income of the joint property, or of such increment as the Testator expressly prohibited partition being made of, which comprised his estate and business at the time of his death, having intimated his desire that his family should continue joint. This is

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similar to a devise to Executors, with direction either to carry on a particular trade or business, which, according to the principles recognized in Courts of Equity, only creates a trust. Hope the Testator's five Sons took care that no partition ever took place, and *Muddoosoodun Chunder* continued, after the death of the Testator, in all respects joint with his Brothers in estate, food, and worship, up to the time of his death. The Court should, therefore, have decided that, as no separate interest, either in the *corpus* or in the increment, ever vested in him in his lifetime, nothing passed at his death to his Widow. It is important to bear in mind, that *Muddoosoodun Chunder*, along with his four Brothers, acquiesced in and gave effect to the prohibition in the Will against partition, and dealt with the accumulations and increase formed from the surplus income of the Testator's estate as an increment to, and as an integral portion of, the original joint estate. It follows, therefore, that the Plaintiff, as his Widow and heiress, claiming title through him after his death, was bound by his acts during his life, and could not, therefore, claim any account of such accumulations and increase; or any partition or separation of the increment from the original joint estate in respect of the one-fifth sharer of her deceased Husband in the estate. It is a familiar rule of Hindoo law, that accumulations go with the capital; and it has been held that increment follows principal, *Gooroochurn Doss v. Goluckmoney Dossee* (a); *Prawkissen Mitter v. Muttoosondery Dossee* (b). Until partition, and even after an inchoate partition, the rights of co-sharers are not varied, the whole remains common stock. *Daya-bhaga*, ch. VI., sec. I., par. 50; ch. XII., par. 1; *Mitácshará*, ch. I., sec. IV., par. 30;

(a) 1 Fulton, 165.

(b) *Ib.*, 389.

Strange's "Hindu Law," Vol. I., p., 199 [2nd Edit.];
W. H. Macnaghten's "Hindu Law," Vol. II., p. 162.
Sonatun Bysack v. Sreemutty Juggutsoondee Dossee (a). The High Court in a great measure founded their judgment upon the case of *Sreemutty Soorjee-money Dossee v. Denobundoo Mullick* (b) as to the Plaintiff's right to the share of the accumulations arising from the surplus income; but that case is distinguishable from the present, as there was a gift over to the surviving Sons, which is not to be found in this Will. Even if the decree was right in declaring the Plaintiff entitled to her Husband's one-fifth share in the increment of the estate, yet the whole of the Company's paper ought to have been by the decree especially excepted, therefrom, inasmuch as the same had been indorsed and transferred in his lifetime, in anticipation of his death, to his four Brothers by the Plaintiff's Husband. According to the decree, he had an absolute interest in the one-fifth share in such increment, and, therefore, had full power to alienate the same, whether such alienation was to take effect in his lifetime or on his death, by way of testamentary disposition. So, again, the Respondent, as the Widow of a Son dying without leaving a Son, having left the house of the Testator, and gone to live elsewhere, is expressly excluded by the Will from any participation in or claim to the estate in respect of her Husband's share therein, except as to the legacy of Rs. 2,000, bequeathed to her on that event, namely, the leaving the house. The Defendants having admitted assets sufficient to pay the legacy of Rs. 2,000, no general account should have been directed by the Court below.

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(a) 8 Moore's Ind. App. Cases, 66.

(b) 6 Moore's Ind. App. Cases, 526.

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Mr. *Kay*, Q.C., and Mr. *W. Pearson*, for the Respondents.

The Court below has put a proper construction on the Will. The five Sons of the Testator took an absolute estate in his property. They continued joint in family, without partition, so that on the Plaintiff's Husband's death, his share fell in to the surviving Brothers. All that the Plaintiff could be entitled to by Hindoo law was one-fifth of the accumulations, which she took by succession on her Husband's death. The case is on all fours with *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (a), and, unless that case is to be overruled, it must govern the present. There it was held by this Tribunal, upon the construction of the Will of a Hindoo nearly similar in terms with the Testator's Will, that, in the absence of any direction of the Testator that his Sons should continue a joint family, such intention could not be imported into the Will, and that the Testator's intention being, that his five Sons should enjoy, during their lives, the interest of their respective shares in the property; therefore, although one of the Son's share, who had died, went over to the surviving Sons, his Widow was entitled to one-fifth of the surplus income which had accumulated since the Testator's death, and during her Husband's lifetime, and the increment arising out of such accumulations. *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee* (b) is not at variance with the principles laid down in the former case, the only distinction being, that the Testator directed that the property should never be divided; by his Sons, their Sons, or Grandchildren in succession, and that they

(a) 6 Moore's Ind. App. Cases, 526.

(b) 8 Moore's Ind. App. Cases, 66.

should enjoy the surplus proceeds only. In the event that has happened, namely, the Plaintiff having left the family house, she became entitled, irrespective of her right by descent as her Husband's heiress, under the Will to the specific bequest of Rs. 2,000.

Their Lordships' judgment was delivered by

The Right Hon. Lord ROMILLY.

Their Lordships are of opinion, that the decree of the Supreme Court of Judicature at *Calcutta* is correct. It is a question upon the construction of the Will, and the meaning of the Testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in *India* relative to these subjects.

It is important, in the first place, to consider what is the nature of the interest which he has given to his Sons. He has directed his Sons, using the words, "continuing joint in food" to take care of and look after his property, movable and immovable, and carry on his trading business. It is to be observed, that this interest is not accurately represented by the words "joint estate" in *England*, for if he had given the property simply to the Sons, with no further direction than that they should live jointly in respect of food, and one of the Sons had died, his share, with all the accretions, would have gone to his heir, to the person who was entitled to inherit according to the Hindoo law, so that in point of fact the interest was, as regards succession, more analogous to the tenancy in common which prevails in *England*. It is also proper to observe, that no analogy exists between the present case and that to which it was endeavoured to be likened, viz., where a Testator in *England* has given the property to Executors for the purpose of

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carrying on his trade, in which case a trust is imposed upon the Executors, who take no beneficial interest in it, and the question is, how the profits of that trade are to be divided amongst the persons who are pointed out by the Testator. It is, therefore, in this case important to observe, whether the Testator has pointed out in his Will how the share of his property is to go, upon the death of any one of his Sons, and also how far that direction extends. According to the Will, if one of the Sons had died, leaving a Son, the share of the Son so dying would have gone to his Son, or, in other words, the Grandson of the Testator. It is only in the event of his Son not leaving a Son that the Testator has directed that the share shall go to the survivors. This is of the more importance, because their Lordships are of opinion, that this construction is not lightly to be inferred, but that it is necessary that the Testator should express distinctly what his intention is. This they think that he has done. It was argued that a considerable distinction existed between this case and the case of *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (6 Moore's Ind. App. Cases, 526), because in that case one-fifth was given to each Son, and if one died, the fifth was given over; but their Lordships are of opinion, that the effect of this Will is to direct that the share which each Son took, and which would have gone to his heirs according to the Hindoo law, was, in the case of any one of his Sons leaving no Son, directed to go to the other Sons, if not in express words, still by a necessary inference to be drawn from the expressions used by him, and this is indeed the contention of the Respondents, and was so held in the Court below, from which decision the Appellants have not appealed. The question is,

whether the share of profits made during the joint lives of the Sons which belonged to the deceased Son follows his share of the capital and goes over to the other Sons. In the first place, it is to be observed, that the Testator has given no direction to accumulate; it remains, therefore, to be seen, whether the Court can find, from the words of the Will, as was argued, an irresistible inference that such was the intention of the Testator. This is the more important, because in the case of *Sonatun Bysack v. Sreemutty Fuggutsoondree Dossee* (8 Moore's Ind. App. Cases, 66), which is relied upon as governing this case, there is an express direction to accumulate. It was there directed that the surplus was to be added to the capital. There is an absence of that in this case. It is admitted that the Testator could not dispose of the property of his Son, or prevent the heir of the Son from inheriting his property; therefore, the only question here is, whether the Testator has directed the accumulations of the property to be added to and made part of his own property, because if he has not, it was the property of the Son, and the Testator had no power of disposing of it.

In this view of the case their Lordships think that this Will, on whichever construction it is taken, shows an absence of any direction to accumulate. The first direction is, that the Sons should live joint in respect of food, and that they should carry on the trading business, and so forth. If the Will had stopped there, the only result would have been, that upon the death of this Son his heir would have taken his share in the business; but the Will goes on to give a direction, that should the Sons disagree, then, after making certain directions as to the application of the income, the surplus was to be partitioned

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equally amongst them. That is directly opposed to any accumulation. Nor does the Testator give any direction whatever in respect to what is to be done with the profits before they disagree and separate. It would follow, therefore, if the Will ended there, that the profits arising from the business would be the separate property of each of the five Sons in fifths, after they had provided for the carrying on of the business. We find nothing in the subsequent parts of the Will which interferes with that. The second section is the only part of the Will which relates to this subject. The Testator there directs, that if any of the Sons should die without a Son, then that the Daughters of that Son should receive Rs. 100, and his widowed Wife, if she lived, being included as a member of the family, should receive the expenses of *brito neom* acts, and the other religious acts and ceremonies which she should perform. Then he directs what is to be done, if ungovernable, and not living in his house, she should go and live elsewhere, or not wish to live in the family, then she "shall receive Rs. 2,000." Besides this, he directs that she shall not be able to make any demand or claim on his movable and immovable property, trading business, and estate, &c., upon the allegation of her Husband's proper share; that is to say, she is not to be at liberty to make any claim or demand upon the movable or immovable property of the Testator, and there it stops. This brings it round exactly to the same question, whether the Testator has in fact by these words disposed of anything more than the capital of the fund. The words he uses are: "my movable and immovable property, trading business, and properties, &c., she will be unable to make a claim or demand to her Husband's suit-

able share," that is, his share of the Testator's property ; that is, the one-fifth of the trading business, which the Testator had given to him. If their Lordships are right in coming to the conclusion that the Testator has said nothing about what is to be done with the profits of the business, and has made no direction to accumulate, it necessarily follows, that those profits belong to each of the Sons in fifths, and accordingly would be divided as such ; and, therefore, upon the true construction of the Will, their Lordships are of opinion, that the Testator has not attempted to dispose of these profits, which are the property of the Son ; if he had, a question might have arisen whether such a direction could have been a valid one or not, but their Lordships are of opinion, upon a fair construction of the words he has used, that it was his intention not to touch the question of profits, but to leave them to go as they would go, according to law, in case there was no disagreement between the Sons, the result of which would be that each would take a fifth of the surplus profits, that this fifth would be the property of each Son, and would go to his heirs, exactly in the same manner as any other property that he might acquire. It will be obvious, that if the Son had taken his share of the profits, and invested it in the purchase of any other property, no question could have arisen. It is a fair inference also that the view that he took in case they disagreed, viz., that they should divide the surplus profit, is a sort of guide for what he intended they should do in case they did not disagree at all.

Their Lordships also think, that this case is exceedingly close upon the case of *Sreemutty Soorjee-money Dossee v. Denobundoo Mullick* (6 Moore's

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Ind. App. Cases, 526), and, although they would reluctantly allow, in the construction of a Will, the construction of one Will to be an imperative guide for the construction of another, where the expressions were not identical, still they think that the principles laid down in that case govern the present ; and they concur with the observations made by Sir *Barnes Peacock* in delivering judgment, that the Testator has not attempted to dispose of, and, if he had, could not effectually have disposed of, the property of his Son.

There is another point relative to the property of the partnership, consisting of Company's paper. The facts of the case appear to be these : the partnership assets consisted in part of Company's paper, which were taken in the name of the deceased Son, or in his name jointly with the names of the other Brothers, and it was necessary that they should be indorsed. The result was, that he indorsed the Notes in blank, and gave them to his Brothers. This was, in their Lordships' opinion, a mere ordinary partnership transaction for the purpose of enabling the partners to realize part of the assets of the partnership, which would not affect the right that each Son had to his share of the profits, not giving to the Son, who has died, the exclusive right to the Company's paper, which he so even indorsed, though taken in his name alone, but only making it a part of the assets of the partnership, in which he would be entitled to his share after the expenses of partnership were duly discharged.

Their Lordships, therefore, will humbly recommend Her Majesty that the decision of the Supreme Court of Judicature at *Calcutta* be affirmed with costs.

FATIMA KHATOON CHOWDRAIN and }
 NUSEEBA BEBEE CHOWDRAIN ... } *Appellants,*

AND

MAHOMED JAN CHOWDRY, *alias* }
 KUFEELODDEEN MAHOMED AHSAN } *Respondents.**
 CHOWDRY and others ... }

*On appeal from the High Court of Judicature at
 Bengal.*

THE Appellants were the Wives of one *Kureembuksh Chowdry*, a Son of *Tureekoolah Chowdry*, who died in 1810, leaving a Widow, named *Osmon Khatoon*, and four Sons, *Arif*, *Nyum*, *Sureetoolah*, and *Kureembuksh Chowdry*, and two Daughters, *Sobhan*, *Khatoon*, and *Urman Khatoon*, him surviving, entitled to succeed to his property, which consisted in part of real estate, including a share in *Pergunnah Belgachee*, and the

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° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Romilly (The Master of the Rolls), The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir FitzRoy Kelly (The Lord Chief Baron of the Exchequer).

Assessor :—The Right Hon. Sir Lawrence Peel.

In order to save a family estate about to be sold, under a decree of Court made in a suit against one member of the family ; other members interested in the property, being entitled to dower charged on the estate, paid the amount decreed into Court to be

handed over to the decree-holder under protest of their respective rights in the estate, and subject to a suit to be brought by them to set aside a summary Order rejecting a claim to their charge on the estate. The money so deposited was taken out of Court by the decree-holder. In an action to recover back the amount it appeared, that the decree-holder had no right to proceed against such part of the estate as belonged to the parties paying the money into Court. Held, that an action would lie against the decree-holder to recover the amount so paid into Court and handed over to him, as it was a deposit under protest to prevent an injurious sale.

Aliter. If the money has been a voluntary payment into Court.

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entirety of the *Mehal* of *Donae Dohoo*. In the year 1817, the two eldest Sons, *Nyum Chowdry* and *Arif Chowdry*, formed a plan for dividing the ancestral property amongst themselves and their two Brothers, who were then minors, to the exclusion of their two Sisters, also minors, and in pursuance of that plan they executed an instrument, dated the 4th of *February* of that year, which purported to divide the property into four equal parts, and to allot one of such parts to each of the Brothers. In 1823, however, *Sobhan Khatoon*, one of the Sisters, who had by that time attained her majority, filed a plaint against her Mother, *Osmon Khatoon*, as the guardian of the two Brothers, who were still minors, and also against her elder Brother, *Arif Chowdry*, and *Eptkharoonissa*, the Widow of the other Brother, *Nyum Chowdry*, who had died in 1818, without issue, and thereby sought to set aside the deed of division, and to recover her share of the ancestral property. This suit was dismissed by the Judge of the District of *Rajshye*; and the dismissal was confirmed, on appeal, by the Judge of the Provincial Court of *Moorshedabad*; but, on appeal to the *Sudder Dewanny Adawlut* of *Calcutta*, a decree was passed on the 4th of *April*, 1834, declaring that the property, left by their Father, *Tureekoolah Chowdry*, which the four Brothers had divided amongst themselves, was ancestral property, to which the Widow and children of *Tureekoolah Chowdry* were jointly entitled, in the shares and proportions recognized by the Mahomedan law, and that the division was a collusive one and in fraud of their two Sisters; and an Order was accordingly made that the decision appealed against should be set aside, and that *Sobhan Khatoon*, the

Plaintiff, should be put in possession of her share of the ancestral property with mesne profits.

The ancestral property, to a share of which *Sobhan Khatoon* was thus declared to be entitled, included the *Mehal* of *Donae Dohoo*; but on the 4th of *March*, 1837, the whole of that *Mehal* was sold by the Deputy Collector of *Patna* for arrears of revenue, and realized the sum of Rs. 22,100, which, after deducting Rs. 1,730. 7a. 6p. arrears of revenue due to Government, left a balance of Rs. 20,369. 8a. 6p. divisible according to the decree of the *Sudder Court* of the 4th of *April*, 1834, among the heirs of *Tureekoolah Chowdry*, of which a sum of Rs. 3,565. 0a. 5p. belonged to the estate of the deceased, *Nyum Chowdry*, in respect of his interest (2 annas 16 gundas share) in his Father's property. This sum of Rs. 3,565. 0a. 5p. appeared to have been applied, together with the greater part of the residue of the money realized by the sale, in liquidation of some debts owing by *Kureembuksh Chowdry* and *Sureetoolah Chowdry*.

While the above suit was pending, *Sureetoolah Chowdry* married one *Ruhmutoonissa*, and on the occasion of his marriage executed a *Kabinnamah*, or marriage settlement, by which, in lieu of her dower, he settled upon his Wife, amongst other property, his interest in *Pergunnah Belgachee*; and on the 16th of *March*, 1838, *Kureembuksh Chowdry* married the Appellant, *Nuseeba Bebee Chowdrain*, and in like manner settled upon her a moiety of his interest in *Pergunnah Belgachee*, and in *September*, 1846, he also married the Appellant, *Fatima Khatoon Chowdrain*, and executed another marriage settlement, by which the remaining moiety of *Pergunnah Belgachee* was settled upon her.

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In pursuance of these settlements, *Ruhmutoonissa* and the Appellants entered into possession of the lands thereby conveyed, let them to tenants, brought suits for the recovery of the rents in their own names, and obtained decrees, and in every way enjoyed the property as their own.

In *July*, 1837, *Anundlochun Nundy* and others instituted a suit in the District Court of *Rajshye* against *Sureetoolah Chowdry*, *Kureembuksh Chowdry*, *Sobhan Khatoon*, *Arif Chowdry*, *Osman Khatoon*, and *Eptkharoonissa*, as the heirs of *Nyum Chowdry*, deceased, to recover a sum of Rs. 23,466. 10a. 8p., alleged to be due from the deceased *Nyum Chowdry*, and a decree was made by the Court in their favour on the 31st of *December*, 1842, by which it was ordered, that *Sureetoolah Chowdry* and *Kureembuksh Chowdry*, *Sobhan Khatoon*, and *Eptkharoonissa*, should pay the Plaintiffs the sum of Rs. 23,466. 10a. 8p., being the amount of principal and interest and costs of suit, together with interest up to the date of payment—first, from the property left by the deceased, *Nyum Chowdry*, and that if the same should not be sufficient, then that the balance should be paid by them from the proceeds of the sale of the right of the deceased, *Nyum Chowdry*, in the *Mehal* of *Donae Dohoo*.

In *July*, 1845, the above Plaintiffs sold their rights under the decree to *Nujuminissa Chowdrain*, and she was substituted as the decree-holder in their place. *Nujuminissa Chowdrain* thereupon caused *Nyum Chowdry's* interest in the *Pergunnah Belgachee* to be put up for sale, in pursuance of the decree, and became herself the purchaser, at the price of Rs. 16,000. She then, in *January*, 1847, instituted a suit against

Kureembuksh Chowdry and his Wives, the two Appellants, *Ruhumutoonissa*, the Widow of *Sureetoolah Chowdry*, *Arif Chowdry*, and other persons, alleged to be in possession of *Pergunnah Belgachee*, for the purpose of enforcing her decree and the sale made in pursuance thereof, and of obtaining possession of *Nyum Chowdry's* interest in that *Pergunnah*, which she alleged amounted to a 4 annas 11 gundas 2 cowries share.

The Court decreed the entire claim; but three appeals were preferred—one of them by *Ruhumutoonissa* and the Appellants, and the *Sudder Dewanny Adawlut*, on the 18th of November, 1856, remanded the case for further inquiry, when the interest of the debtor in the *Pergunnah* was found to consist of a 4 annas 8 gundas 3 cowries and 1 *krant* share, and the Court accordingly decreed to the Plaintiff possession of the share, with mesne profits.

As, however, this sum of Rs. 16,000, realized by the sale of *Nyum Chowdry's* interest in the *Pergunnah*, was not sufficient to satisfy the claim of the decree-holder under the decree, a petition was presented for further execution, in pursuance of which *Pergunnah Belgachee* was put up for sale, as the property of *Sureetoolah Chowdry* and *Kureembuksh Chowdry*. On that occasion one *Khoondkar Ali-moodden* was declared the purchaser, and paid Rs. 8,287. 8a. into Court, as earnest money; but he failed to complete the sale, and the deposit became forfeited. Although the sum thus forfeited considerably exceeded the sum of Rs. 3,565. 0a. 5p., which alone the decree-holder was entitled to receive from *Kureembuksh Chowdry* and *Sureetoolah Chowdry*, under the decree which had thus been satisfied,

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Nujuminissa Chowdrain prayed for another sale of *Pergunnah Belgachee*, and a proclamation for such sale was issued. Against this sale *Ruhumutoonissa* and the Appellants presented a petition to the Court in *May*, 1849, in which, after stating that their property in *Pergunnah Belgachee* had been attached as the property of the Debtor, and had been ordered to be sold, and that, in order to save their property, it was necessary to deposit in Court the full amount recoverable by the decree-holder; they averred, that they had mortgaged their interest in the *Pergunnah* to raise the money, and prayed to be permitted to pay the amount of the decree into Court, and that the *Pergunnah* should be released from the attachment and sale.

When this petition was read in Court, the Principal *Sudder Ameen*, asked the Pleader for the Petitioners, whether his Clients had any objection to the payment to the decree-holder of the amount which he wished to deposit in Court. The Pleader answered this question in the following words:—"I will bring a regular suit for setting aside the summary Order, rejecting the claim, but the sale cannot be stayed unless the amount recoverable by the decree-holder is deposited. I, therefore, deposit the amount for the purpose of it being paid to the decree-holder, and pray that the said sum be paid to the decree-holder, and the sale be stayed." The Petitioners were thereupon ordered to pay down the full amount due to the decree-holder immediately, and accordingly paid Rs. 29,640. 10a. 1p. into Court, which amount was paid, together with the forfeited deposit, on the 12th of *September*, 1849, to *Nujuminissa Chowdrain*.

Subsequently, although she had now received Rs. 53,927 in cash and land, in satisfaction of her

original decree for Rs. 23,466, *Nujuminissa Chowdrain* obtained from the *Sudder Dewanny Adawlut*, on the 31st of *March*, 1851, an Order for the revival of the execution case, for enforcing the decree; in accordance with which, an Order, dated the 13th of *March*, 1852, was sent to the Judge of *Dacca*, requesting him to cause *Pergunnah Belgachee* to be again put up for sale, for the purpose of realizing a sum of Rs. 13,152. 10a. 11p., alleged to be yet due upon the decree, together with costs of sale. In pursuance of this Order, the property was put up for sale, and sold for Rs. 35,375; but on the 28th of *June*, 1853, after the purchase-money had been deposited, *Ruhumutoonissa* presented a petition, detailing the above-mentioned circumstances, and praying that the sale might be stayed, and that the execution Creditors might be ordered to refund her share, being a moiety of the sum which they had received in excess of their rights under the decree. On the 6th of *July*, 1853, the Appellants presented a similar petition; but by an Order, dated the 29th of *April*, 1854, the Principal *Sudder Ameen* rejected both petitions, on the ground that the Petitioners ought to have brought a regular suit, and could not obtain relief in a summary manner upon petition; and also that the objection to the sale was not taken in time. The sale, however, was subsequently set aside for some informality, and a sale *de novo* ordered to take place on the 5th of *December*, 1854, whereupon *Ruhumutoonissa* and the Appellants presented another petition, praying that this second sale might be stayed, on the ground that the decree-holders had already realized far more than the sum of Rs. 3,565, that being the amount of *Nyum Chowdry's* interest in *Donae Dohoo*, and the only

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sum to which they were entitled under the terms of their decree. *Nujuminissa Chowdrain* objected that the whole of *Donac Dohoo* had belonged to *Nyum Chowdry*, and that *Kureembuksh Chowdry* and *Sureetoolah Chowdry* had received Rs. 18,482 out of that property, and were also in the actual possession and enjoyment of other property which had belonged to the deceased *Nyum Chowdry*, and was liable to satisfy their decree. The Judge, however, held, in accordance with the decree of the 4th of *April*, 1834, that *Nyum Chowdry* was only entitled to Rs. 3,565 out of the proceeds of *Donac Dohoo*; and as more than that sum had already been realized, and there was no other property of *Nyum Chowdry* subject to the decree, he stayed the sale, and directed that the decree of *Sudder Dewanny Adawlut* should be returned with a certificate that it was fully satisfied. From this Order *Nujuminissa Chowdrain* presented a petition of appeal to the *Sudder Dewanny Adawlut*, who rejected her petition, with costs.

In *July*, 1858, the *Ruhumutoonissa* executed a deed of gift, by which she assigned to the Appellants her share of the Rs. 29,640 deposited in Court to prevent the sale of *Pergunnah Belgachee*.

On the 23rd of *June*, 1859, the Appellants filed the plaint in respect of which this appeal was brought against *Nujuminissa Chowdrain* and her Husband, *Fakeerooden Mohamed Ahsan*, alias *Azeemooddeen Chowdry*, in the Court of the Principal *Sudder Ameen* of the District of *Rajshye*, and, after reciting the above facts, and alleging that *Nujuminissa's* name only had been used, and that the decree was really the property of the Husband, claimed the return of the sum of Rs. 29,640 (paid

into Court on the 7th of *May*, 1849), together with an equal amount for interest thereon, amounting in the whole to Rs. 59,281. 4a. 10p.

Nujuminissa Chowdrain put in a written statement by way of answer, in which she, first, denied the right of the Appellants to prefer any claim, on the ground that they were not parties to the original decree against *Nyum Chowdry*; secondly, she alleged that the whole of *Donae Dohoo* belonged to *Nyum Chowdry*, and not a 2 annas 16 gundas share only; thirdly, she alleged that *Sureetoollah Chowdry* and *Kureembuksh Chowdry* had been in possession of the share of *Nyum Chowdry* in *Pergunnah Belgachee*, from his death in 1819, up to the sale in 1846, in execution of her decree; and have received and appropriated more than Rs. 3,000 per annum out of the profits thereof, for which they were consequently liable to account to her; fourthly, she denied the alleged gift from *Ruhumutoonissa* to the Appellants; fifthly, she pleaded that such a gift was not valid under the Mahomedan law; sixthly, she averred that by the Order of the 29th *April*, 1854, the matters sought to be put in issue by the plaint had already been decided; seventhly, she asserted that the purchase of the decree was made by her for her own benefit, and not in her name for the benefit of her Husband; and lastly, she denied that the shares of *Sureetoollah Chowdry* and *Kureembuksh Chowdry* in *Pergunnah Belgachee*, which were ordered to be sold in execution of her decree, were the property of the Appellants, or of *Ruhumutoonissa*, under their *Kabins* or marriage settlements. The answer of her Husband denied that the purchase of the decree was made for his benefit, and also the right of the Appellants to bring

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the suit, on the ground that they were not parties to the original decree.

On the 8th of *June*, 1860, the Principal *Sudder Ameen* (*Punchanun Banerjea*) pronounced his decision. After stating the points raised by the Defendants, the Judge observed, that there was one issue of law, whether the suit was admissible, when neither the Plaintiffs nor their Donor were parties to the execution case. There were also three issues of fact: first, whether the property ordered to be sold belonged to the Plaintiffs or their Donor, by virtue of the *Kabins* or not; second, whether *Ruhumutoonissa* had executed a deed of gift of her interest, and, if so, whether such gift was valid; third, whether the decree-holder by causing an attachment, contrary to the decretal Order, had fraudulently and illegally realized the amount claimed in the Order. As to the issue of law, the Judge decided in favour of the Appellants. Passing then to the issues of fact, the Judge found that the *Kabins* had been proved by the testimony of respectable witnesses; that they had on different occasions been produced in Court; and, on their being found to be proved, the Plaintiffs and *Ruhumutoonissa* had obtained decrees on the strength of them; and that they had been admitted as genuine in other suits, by persons whose interests would be injured by them. He held, moreover, that, independently of the *Kabins*, upon the assumption that the decree-holder had illegally recovered the Plaintiffs' money in excess of, and contrary to the decretal order, she was bound to refund it, and he pointed out that the conduct of the Plaintiffs, in depositing the money in Court, although not the only means of regaining their rights, was a

natural step, and such as a prudent owner might reasonably be expected to adopt, under the circumstances. The second and third issues of fact were considered together, and the Judge arrived at the conclusion, that the fact of the decree-holder having unjustly recovered Rs. 34,363, in excess of her claim, was fully established; and that as Rs. 29,640, a part of that sum, had been deposited in Court by the Plaintiffs, they were entitled to recover that sum with interest. Lastly, he found that *Nujuminissa Chowdrain* had purchased the decree on her own account, and not in trust for her Husband; and he accordingly decreed that the amount claimed, with interest and costs, should be paid by her to the Plaintiffs, but dismissed the suit, with costs, as against the Husband.

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Nujuminissa Chowdrain appealed from this decision to the High Court of Judicature at *Fort William*. The appeal was heard before Messrs. *Raikes* and *Seton Karr*, two of the Judges of that Court, on the 10th of *July*, 1863, when the decree of the Lower Court was reversed, on a ground not taken in the Court below, namely, that as the rights and interests of the judgment Debtors were alone advertised for sale, the sale, under such circumstances, could not have deprived the Plaintiffs of any right or interest they really had in the property, and that, therefore, the payment of the debt by them was not necessary to protect their interests, but was a voluntary payment, for the recovery of which they had no right of action against the judgment Creditors, and the Court thereupon made a decree dismissing the Plaintiffs' suit, with costs, in both Courts.

From this decree *Fatima Khatoon* and *Nuseeba Beebee* appealed to the Queen in Council. *Nuju-*

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minissa Chowdrain having died, pending the appeal, the present Respondents were substituted as her heirs.

As the Respondents did not appear, the appeal was heard *ex parte*.

Mr. *Cave*, for the Appellants.

There can be no question that the Appellants and *Ruhumutoonissa* were entitled under their *Kabinna-mahs*, to their respective shares claimed by them in the *Pergunnah*, and the Appellants are also now entitled, under the deed of gift of *July*, 1858, to the share of *Ruhumutoonissa*, in the Rs. 29,640. 10a. 1p. It is clear, that *Nujuminissa Chowdrain* had no right to receive under her decree more than Rs. 3,565, out of the proceeds of the sale of *Donae Dohoo*, the same being the whole amount of *Nyum Chowdry's* interest therein. The effect of that decree, it is submitted, was to give the decree-holders a right, first, to realize the other property left by *Nyum Chowdry*, and apply the proceeds in satisfaction of the decree; and, secondly, if such proceeds proved insufficient, to obtain payment of the balance out of the sum of Rs. 3,565. 0a. 5p., the value of *Nyum Chowdry's* interest in *Donae Dohoo*, which sum had, in fact, been applied in payment of debts owing by *Kureembuksh Chowdry* and *Sureetoolah Chowdry*. The Court below entirely misconceived, first, the facts established, and, secondly, the true question at issue, and was wrong in deciding that the payment of the sum of Rs. 29,640. 10a. 1p. into Court was such a voluntary payment, as to render it irrecoverable in the present suit; and as *Nujuminissa Chowdrain* had wrongfully received that sum under her decree, the

High Court ought to have ordered her to repay the same to the Appellants, with interest.

The Right Hon. Lord ROMILLY.

This case, when divested of all that which is not material to the question before this Board, may be stated as follows:—The Appellants, two Sisters, who had married individuals of the same family, became entitled, under what we should in this country call a marriage settlement, to dower in the form of a charge on an estate or property which had belonged to a person of the name of *Nyum Chowdry*. He having died in debt, his heirs or representatives were sued by various persons, and, among others, by those whom the Respondents now represent, to recover some very considerable debts alleged to have been due by him; in which suit they obtained judgment. Under that judgment certain other properties were attached and sold, and the judgment was in part satisfied. If it were necessary to look into the particulars of these numerous and somewhat complicated proceedings, it would probably appear (and that alone would be a ground upon which the Respondents must be held disentitled to retain the money they have received) that this judgment was in effect satisfied; that all that the decree of the Court had entitled the Respondents to take out of the different properties in question had been paid and satisfied in one way or another; and was received by them so as to disentitle them to institute or to continue any further proceedings against these properties in respect of the claim now in question. However, they did, in fact, obtain an authority, under one of

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the many proceedings that have taken place, to sell the estate upon which the dower of the Appellants was charged.

In order to prevent that sale, which would have been mischievous and prejudicial in the highest degree to the rights of the now Appellants, they, upon a proceeding which they instituted, and under the authority of the Court, not voluntarily, but under protest, and because they were compelled to take that step in order to prevent the sale of the estate, paid the sum of between Rs. 59,000 and Rs. 60,000 into Court; and it appears that that payment into Court having taken place in order to prevent a sale of the property, under which the rights of all parties, and, among others, of the Appellants, were expressly reserved, the question arose, and arose in rather a singular form, whether the money should remain in Court, or whether it might not be paid over to the Respondents. Undoubtedly the Appellants' Pleader consented at once that the money should be paid over to them.

The money that had been paid into Court, not voluntarily, but under this species of compulsion, and for the purpose of preventing this injurious sale of the property, was paid over accordingly; the only voluntary act which was done being the consent given by the Appellants, that the money, instead of remaining in Court, should in the meantime, and until the rights of the parties could be settled by the final decree of the Court, be paid over to the Respondents. Afterwards, when all these circumstances came before the *Zillah* Court, and all the questions were raised which either party thought fit to raise, or had the power to raise, in the then state of the suits, the

Appellants obtained a decree, dated the 8th of *June*, 1860, in their favour against the Respondents, for the sum of Rs. 59,281 and a fraction, being the amount paid by them into Court as before mentioned. Against this decree an appeal was lodged, which was carried before the High Court of Judicature at *Fort William* in *Bengal*. The High Court, having considered the whole case, did not in any way enter into the merits of the case itself, or of the decision of the Court below, at least upon the grounds upon which the case had been decided, but took the point for themselves, that by law the payment to the Respondents of the money of the Appellants, under the circumstances in which it was made, constituted a voluntary payment with the full knowledge of the facts, and, therefore, that the money could not be recovered back. If it had been such a payment, no doubt such is the law; but when we look at the circumstances of the petition of the Appellants, dated the 17th of *May*, 1849, when the money was paid into Court, we find, in the first place, it was not a payment at all. It was originally a mere deposit in Court of the full amount recoverable by the decree-holder. It was deposited, under protest, for the purpose of preventing an injurious sale of the whole property. Then it appears that upon the reading of the petition, the Pleader for the Petitioners was asked, whether his Clients had any objection to the payment to the decree-holder of the amount which had been so deposited; and the answer was, "I will bring a regular suit for setting aside the summary Order rejecting the claim, but the sale cannot be stayed unless the amount recoverable by the decree-holder is deposited: I, therefore, deposit the amount for the purpose of its being paid to the decree-

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holder, and pray that the said sum be paid to the decree-holder and the sale be stayed."

Those were the circumstances under which the money was paid, the payment being clearly no voluntary payment; and the suit having been determined on its merits in favour of the Appellants, they are clearly entitled to recover this money back again. Therefore, the Order that we shall advise Her Majesty to make is, that the decree of the High Court of Judicature, reversing the decree of the *Zillah* Court, be reversed, and that the decree of the *Zillah* Court be confirmed; and that the Appellants be held entitled to recover Rs. 59,821 and a fraction, as decreed by the judgment of the 8th of *June*, 1860. It is satisfactory to feel, as their Lordships have not entered into the merits of the case on the many points argued in the *Zillah* Court and in the High Court, that substantial justice will be done by the Order which they will now advise Her Majesty to pronounce; for it is perfectly clear, on the one hand, that the Respondents had no right to this money out of that estate at all, they having been satisfied to the extent that the former decrees of any Court or Courts entitled them to recovery out of that property; and, on the other hand, it appears perfectly clear, that the Appellants paid this money merely for the purpose of preventing a sale of the property, so that they are, in justice as well as in law, entitled to recover. The Appellants must also be held entitled to the costs of the appeal, and of the reversal of the decree, and to the usual interest, at the current Court rate, upon the sum to which they are so entitled.

SOORENDRONATH ROY ... *Appellant* ;

AND

MUSSAMUT HEERAMONEE BURMONEAH, *Respondent*.*

*On appeal from the High Court of Judicature
at Bengal.*

THE parties in this case were Hindoos, members of a family who many generations ago emigrated from *Mithila*, where the *Mitácshará* prevails, and settled

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The prevalence in any part of *India* of a special rule of descent in a family, differing from the ordinary

° Present :—Members of the *Judicial Committee* :—The Right Hon. the Lord Justice Wood, the Right Hon. the Lord Justice Selwyn, and the Right Hon. Sir James William Colvile.

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course of descent common in the locality among people of the like class or race, stands upon the footing of the usage or custom of the family, which having a legal origin and continuance, regulates the succession.

So close a connection exists in Hindoo Law between religion and succession to property, that the preferable right to perform the *Shradh*, or funeral oblation to the last owner, is a primary fact to be taken into consideration in determining the rule which is to govern the right of succession.

A Hindoo family migrated many generations ago from *Mithila*, where the *Mitácshará* was, and still is, the prevailing law ; and settled in *Bengal*, where the *Daya-bhaga* prevails, acquiring real and personal property situate there. The family continued joint, retaining their customs, usages, and religious observances, as before their migration, according to the doctrines of the *Mitácshará* :—Held, on a question of succession, that the *Mitácshará*, and not the *Daya-bhaga*, the *lex loci*, was the governing authority to determine the right of succession.

As the presumption is, that the members of a family so emigrated continue such family customs, the *onus* is upon a party who alleges cessation of such customs to prove that fact.

Semble. A family who had so emigrated may retain its religious rites and observances, and yet acquiesce in a devolution of property, in the common course of descent amongst persons of the same race, in the District in which they have settled.

According to the *Mitácshará*, a first Cousin is entitled to succeed to the estate to the exclusion of his deceased Cousin's childless Widow.

A Will of a Hindoo, whose family were governed by the *Mitácshará*, made in favour of his first Cousin, who lived in joint estate with him, to the disinherision of his Widow, except a small provision for her maintenance, in the event of her leaving the family home, in the circumstances, and upon the evidence, declared proved and established.

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in *Bengal*. The principal point raised by the appeal was, with respect to the right of succession to real and personal estate situate in *Bengal*, between the representatives of two first Cousins, named *Paresnauth* and *Batooknauth*, joint in estate, descendants of their Grandfather, *Khoderam Roy*, of the *Khettry* caste, involving the question, whether the succession was to be governed by the *Mitácshará*, the law of the place from whence the family emigrated, which law and religious observances it was alleged had been followed by the family after they resided in *Bengal*; or, whether the *Daya-bhaga*, the *lex loci*, was to govern the succession. If the former law prevailed, *Paresnauth* succeeded as heir to *Batooknauth* in preference to the Respondent, his childless Widow, who relied on the *Daya-bhaga*, as regulating her right to succeed to her deceased Husband's estate. The second question related to the validity of a Will made by *Batooknauth* in favour of *Paresnauth*, which, subject to a small allowance for maintenance, in the event therein specified, disinherited his Widow, and which testamentary disposition was invalid if the *Daya-bhaga* prevailed. The Respondent also relied upon a deed, alleged by her to have been executed by her Husband, making her his heiress.

The suit was brought by the Respondent against the Appellant, the son of *Paresnauth*, then a Minor, by his Guardians, his Grandmother and Mother, to oust him from the possession of a moiety of the family estate, real and personal, the entirety of which, he was in possession of; and which moiety formerly belonged to *Batooknauth*, the Respondent's Husband. The Respondent, in her plaint, grounded her title under a deed, called a *Nedurshun Putter*, which she alleged had been executed in her favour by her late Husband

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during his last illness, constituting her his heiress. This deed the Respondent asserted had been wrongfully taken possession of and destroyed by *Paresnauth*. The Respondent also alleged in the plaint, that her late Husband had at the same time given her a verbal direction or authority to adopt a Son to him, but which she had not acted upon. This deed and the verbal authority were afterwards, in the course of the suit, abandoned by the Respondent; and, consequently, no issue was raised on those allegations. The Respondent also sought by her suit to obtain a decree for the cancellation of the before-mentioned Will, which she alleged had been fabricated and forged by *Paresnauth*. There was no allegation in the plaint that she was his heiress-at-law, which she would have been if the succession had been governed by the doctrines and rules of the *Daya-bhaga*.

The Appellant by his Guardians, in his answer, denied the existence of the *Nedurshun Putter*, as well as the alleged verbal authority to adopt a Son; and insisted on the genuineness of the Will of *Batooknauth*, as having been duly executed by him, submitting, that even if such Will had not been duly executed, the Respondent, as Widow, would have only been entitled to an allowance for maintenance, which was provided her by the Will, as the property was joint property, and as such, held and enjoyed by the two Cousins whose family had migrated into *Bengal* from the *North Western Provinces*, from whence they had brought with them, and continued to use at their births, marriages, and funerals, the rites and ceremonies prescribed by the *Shastres* of those Provinces, and had continued to have them performed by *Purohits*, or family Priests. That, like

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Komrouj Brahmins, belonging to the same country, they had never married into *Bengallee* families, and had continued to have their rights of succession governed by the doctrines of the *Mitácshará*, by which Law, it was insisted, than an undivided Cousin would succeed in preference to the Widow of a deceased coparcener.

It was contended by the Respondent in the replication, that the *Daya-bhaga* governed the succession to property in the joint family of her late Husband and the Appellant's late Father; and that, under that Law, she, as Widow, was entitled to succeed to her Husband's moiety in the joint estate.

It appeared from the evidence, that *Paresnauth* performed the *Shradh* of *Batooknauth* as sole heir to him according to the *Mitáchshará Shastres*; and that the Will had been proved in the Civil Court of *Nuddea*, under Act, No. XX. of 1841, and acted upon by *Paresnauth*, under the Court's certificate, up to the time of his death, which event took place about two years after he was in possession of *Batooknauth's* moiety of the family estate.

The facts of the case, and the nature and effect of the evidence upon the above issues, are very fully stated in their Lordships' judgment.

The decree of Mr. *Littledale*, the Judge of *Zillah Nuddea*, dated the 17th of *September*, 1859, decided in favour of the Will executed by *Batooknauth*, which it established; and that Judge held as a sequence, that it was unnecessary to go into the remaining issue, viz.:—whether the question of inheritance was to be determined by the *Shastres* of *Bengal* or of the *North Western Provinces*.

The Respondent appealed from this decree, and

pending the appeal to the High Court the Appellant, having come of age, was made a party in the place of his Guardians.

The appeal was heard before Messrs. *Trevor*, *Seton-Karr*, and *Jackson*, three of the Judges of the High Court, who, by their judgment and decree, dated the 12th of *September*, 1862, held, that it was incumbent, in the first instance, on the Respondent to show her title to sue; and that on her admission as to the origin of the family and their migration from *Mithila* into *Bengal*, she was bound to satisfy the Court that the *Daya-bhaga* was the law which regulated the succession; and that such succession was no longer governed by the *Mitácshará*; and that the Court, if the *Daya-bhaga* was shown to govern, would afterwards consider and decide whether the Will was genuine or a forgery. The Court then decided on the evidence; first, that the family had been for some generations governed by the *Bengal* Law of succession; and secondly, the Court agreed with the Judge of the Court below in placing no reliance on the evidence of the Respondent's witnesses, which went to prove the Will a forgery; but nevertheless held, looking at the internal probabilities, and on the direct evidence thereto of the subscribing witnesses, that the Will was not duly proved, and by the decree, declared the Respondent, as the Widow and heiress-at-law of *Batooknauth*, entitled to the moiety of the estate.

The present appeal was brought from this decree.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

Two questions arise, first, with respect to the Will

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of *Batooknauth*, made in favour of *Paresnauth*, we submit, that the High Court were wrong in their estimate of the evidence, and that the decree of the *Zillah* Court upon that point ought to have been affirmed by them. The High Court, in substance, affirmed the *Zillah* Judge's decree, by holding, that the Respondent's witnesses were untrustworthy, and their evidence not to be relied on; the Court, therefore, ought to have given effect to the evidence of the subscribing witnesses in favour of the Will. It is manifest that the Court was not justified in setting aside the positive and direct testimony of those witnesses as to the *factum* of the Will on mere general surmises of what they term "internal probabilities." The Respondent never objected to the validity of the Will in *Paresnauth's* lifetime, but, on the contrary, acquiesced in his possession of the moiety of the estate her Husband died seized of up to his death, a period of upwards of two years. But, secondly, even if the decree of the High Court was right in deciding against the Will, yet the Court ought to have decided that *Paresnauth* was *Batooknauth's* heir-at-law, and entitled to succeed by the *Mitácshará* to his moiety of the family estate, subject to a provision for the Appellant's maintenance. The evidence established the fact, that the family continued to observe the ancient usages and the religious ceremonies of their ancestors, and that they had not abandoned them, and the Respondent failed to prove that the family had adopted those prescribed by the *Daya-bhaga* or other *Shastres* of *Bengal*. It was admitted by the pleadings, that the family had originally come from the North-Western Provinces, and had migrated to and settled in *Bengal*; the High

Court, therefore, ought, upon the authority of *Rutchputty Dutt Jha v. Rajunder Narain Rae* (a), to have held, that the family usage and custom, was according to the doctrines of the Hindoo law of the *Mithila* school; and that the *Mitácshará* governed the succession in the case, and not the *Daya-bhaga* relied on by the Respondent.

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Mr. *Field*, Q.C., and Mr. *Cave*, for the Respondent.

First, as to the rule of succession which is to govern the rights of the parties, we submit, that the *Daya-bhaga*, the *lex loci*, and not the *Mitácshará*, relied upon by the Appellant, is alone applicable in determining the rights of the parties to the moiety of the family estate. It is to be observed, that *Paresnauth*, in the first instance, relied solely on the Will of the Respondent's Husband under which he got possession of his moiety, and the application of the *Mitácshará* Code as the rule of succession was an afterthought, and was not set up during his lifetime, nor until the answer was filed in this suit. It is admitted, that the estate is situate in *Bengal*, and that it had been acquired by *Khoderam Roy*, the common ancestor, whose family some eight generations ago had settled in *Bengal*; but it was shown by the evidence that, in litigation amongst themselves, the family had treated the *Daya-bhaga* as the law regulating the succession to the family property. It was admitted in those suits, that they were unable to prove that the family followed the *Mitácshará* Code, and it is, therefore, to be assumed that their customs and usages were regulated by the *Shastres* prevalent in *Bengal*.

(a) 2 Moore's Ind. App. Cases, 133.

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By the *Daya-bhaga* the Respondent as Widow is her Husband's heiress-at-law.

Secondly, the Will alleged to have been made by the Appellant's Husband in *Paresnauth's* favour was not established. The Court held, that, looking into internal probabilities and the evidence given in its support, the Will had not been satisfactorily proved, and set it aside. That *Paresnauth* obtained a certificate from the Court, under Act, No. XX. of 1841, and was in undisputed possession of *Batooknauth's* moiety of the estate during his lifetime, a period of more than two years, and no steps taken by the Respondent to assert her rights and dispute the validity of the Will during that period is satisfactorily accounted for by the fact, that she was under fourteen years of age, and lived in *Paresnauth's* house, as a *Purdah Nushen*, or secluded woman; that she did not know how to read or write, and was entirely without means to prosecute her rights.

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Judgment having been reserved, was now delivered by

The Right Hon. Sir JAMES W. COLVILE.

The suit which is to determine the right of succession between the representatives of each of two joint owners, *Paresnauth* and *Batooknauth*, Hindoos, to the succession of one of them, *Batooknauth*, was brought to recover a moiety of a family estate consisting of landed and of movable property which had belonged to one *Khoderam Roy*, the Grandfather of both *Paresnauth* and *Batooknauth*. The property of *Khoderam Roy* descended from him, by inheritance, to his two surviving Grandsons, *Paresnauth* and *Batooknauth*, the Sons respectively of his two Sons, *Jai*

Singh Roy and *Prag Singh Roy*, who had predeceased their Father. These Grandsons, who were first cousins, formed a joint undivided Hindoo family, joint in food, worship, and estate. During their joint lives they resided continually together.

Paresnauth was the Manager. He survived *Batooknauth* about two and a-half years. *Batooknauth* left no children. The Plaintiff was his childless Widow. She was very young at the time of her Husband's death; certainly under fourteen years of age, and perhaps younger. She had, however, near relations, members of her own family, competent to the protection of her rights, her Father, and two other persons; and the Sister of *Batooknauth* had a Son, a minor, in the line of succession to his deceased Uncle under the Law of *Bengal*, and whose Father was competent to the protection of his rights also. The Widow, if entitled, might have been placed under the protection of the Courts of Wards in the case of any probable invasion of her rights.

Paresnauth, on the 18th *Bysach*, 1260, that is, thirteen days after the death of *Batooknauth*, which took place on the 5th *Bysach*, 1260, corresponding to the 16th *April*, 1853, propounded and proved before the Civil Court of *Nuddea*, under Act, No. XX. of 1841, an alleged Will of *Batooknauth*, the cancellation of which instrument is also sought by the Plaintiffs' suit. By this Will, which bore date the 2nd *Bysach*, 1260, three days before his death, the whole of *Batooknauth's* property was given to *Paresnauth*. It contained a provision for maintenance of the Widow; but in case of her quitting the family Rs. 25 per month only were to be allowed her for her maintenance. The usual notifications were issued

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by the Court ; no person appeared to oppose, witnesses were examined, the Will was proved, and the ordinary certificate obtained, and under that title *Paresnauth* enjoyed the property unopposed and undisturbed during the remainder of his life, a period of about two and a-half years. The Will was not registered, but two days only elapsed between the date of it and the death of *Batooknauth*.

Paresnauth left a Will, or testamentary trust deed, by which he appointed his Mother and Wife guardians of his infant Son. It contained a provision for adoption by his Widow in case the infant died, and some directions as to religious rites and usages.

Shortly after *Paresnauth's* death, the Widow of *Batooknauth* asserted her title to a moiety of the property jointly owned and enjoyed by her Husband and *Paresnauth*. Upon her application to the proper authorities to be admitted to her share, she was, in consequence of the certificate before mentioned having been obtained and being in force, directed or advised to proceed by regular suit, and she instituted the suit accordingly out of which this appeal arises. She was the sole Plaintiff, and the Defendants were the Mother and Widow of *Paresnauth*, as Trustees and Guardians of the infant Son of *Paresnauth*, who was also named a party. The suit proceeded in that form until the Son attained majority, when he applied for leave, and was permitted to defend in his own person without guardians. He is the Appellant in this appeal. The property being situate wholly in *Bengal*, and the family having been long resident there, the Plaintiff was certainly entitled to rely on her *primâ facie* title, as heiress under the general Hindoo Law as administered in that part of *India*.

It was incumbent on the Defendants to allege and prove a title displacing this *primâ facie* title. They accordingly pleaded their title, which embraced two separate answers of the Plaintiff's title. They alleged that the title to the property was, by reason of the retention by their family of its ancient Law, that of the *Mitâcshará*, to be governed by that authority, under which *Paresnauth*, and not the Widow, was heir to *Botooknauth*; and besides this, they alleged that *Batooknauth* had bequeathed his whole property to *Paresnauth*. If this last title prevail, it displaces equally a descent *ab intestato*, under either system of law, viz., that of the *Mitâcshará*, or that of the *Dayabhaga*.

Some doubt was raised by Mr. *Cave*, in his argument of this case, as to the original acquisition of this property whether the whole was acquired by *Kholderam Roy*, as a large part certainly was, or whether a part was not ancestral property which had descended to him. It is not necessary to inquire into this subject, because the prevalence in any part of *India* of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of usage or custom of the family. It must have had a legal origin, and have continuance (see *Abraham v. Abraham*, 9 Moore's Ind. App. Cases, pp. 242 and 243); and whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both. A legal foundation for this family usage was laid sufficiently by the evidence. The family came into *Bengal* from a distant part of *India* where the *Mitâcshará* prevails. The High Court did not

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decide more on this issue than that the family had adopted the law of *Bengal* for some generations: that is consistent with a discontinuance of a former usage. It appears further from the evidence of the *Purohit*, that his was an hereditary office, as it very frequently is, and that his ancestors, Officers of the priesthood, and of the family, had followed the *Mitácshará* constantly.

On the evidence, it seems clear, that the family came attended by Priests of their own persuasion; and since Orientals are commonly tenacious of their usages and customs, and more especially of their family and religious observances, therefore, on the ordinary principles of viewing evidence, a continuance of this state of things is presumable, and the *onus* would then lie on the party alleging an interruption or cessation of it to prove such allegation. In this case, therefore, the *onus* of proving such a cessation seems to have been properly declared by the High Court as incumbent on the Plaintiff, in consequence of the admissions in the pleadings.

The Plaintiff originally advanced a title which she did not maintain throughout her suit. She alleged originally that her Husband had given her authority to adopt a Son, and had constituted her heiress, *ad interim*, by a written instrument, of which she alleged the spoliation and destruction by *Paresnauth*. Such an authority is one not unlikely to be conferred. The Will of *Paresnauth* himself evidences the strong desire of a Hindoo to be succeeded by a Son. Why the allegation, if untrue, was made, or why, if true, it was abandoned, it is difficult to say. It is the great misfortune of Hindoo litigants that their cases often fall, in the earlier stages of litigation, into the hands

of incompetent Advisers, who, by the mixture of falsehood with truth, or by the suppression or abandonment of part of a true case, from some mistaken views of policy, or difficulty, create often impediments to its success from which the true story, if revealed, would have been free. If, for instance, it should seem expedient to exaggerate the illness, weakness, or incapacity of an alleged Testator, and to tutor witnesses to such proof, it may be thought politic to drop that part of a case, which necessarily supposes during the same interval a disposing capacity in the Testator; and in Indian cases it is scarcely safe or just to make against the suitor himself the ordinary presumptions from the conduct of a suit, which would be made in our own Courts under the like circumstances.

It has, therefore, been very properly urged in the able arguments on behalf of the Plaintiff, that her youth, ignorance, sex, and dependent state must all be weighed, and have due importance given to them, when her supposed acquiescence in the title of *Paresnauth* is urged against her. As respects herself, personally, the force of these arguments may be admitted so far as they regard acquiescence alone; but her ignorance of *Paresnauth's* proceedings and claim to the whole succession which she alleges, cannot so readily be conceded, and the weight of presumptive proof arising from the conduct both of herself and of other persons competent to the protection of her interests, cannot be excluded from the consideration of their Lordships when deciding whether such ignorance is established in any of them.

The Plaintiff denied in her replication each title pleaded by the Defendants. The Will she alleged

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to be a forgery, and insisted that the *Daya-bhaga* was the authority to be applied to the question of her title to the succession.

The issues of fact, which are stated in the Appellant's case, comprise these two points, the only ones before their Lordships on appeal:—

First, whether *Batooknauth* executed a Will, dated 2nd *Bysach*, 1260, in favour of *Paresnauth*, or not.

Secondly, whether the question of inheritance in this suit is determinable by the *Shastres* of *Bengal*, or of the *Western Provinces*.

The Judge of the Court at *Nuddea* found the first issue, that on the Will, in favour of the Defendants. He expressed no opinion on the second, which, in consequence of his finding on the first, he judged to be then an immaterial issue. On appeal to the High Court, that Court consisting of three Judges, Mr. *Trevor*, Mr. *Seton-Karr*, and Mr. *Jackson*, found unanimously the issues in favour of the Plaintiff, the now Respondent, and reversed the decree of the Civil Court.

In the view which that Court of appeal took, it was necessary to decide both issues; for a decision on the Will alone, unless it had established the Will, would not have decided the case. In the view taken of the Will, in the Civil Court of *Nuddea*, the contention as to which law, whether the *Mitácshará* or the *Daya-bhaga*, should prevail was a needless one, except as it tended to disprove the Will by showing it to be an inofficious disposition.

If, however, the evidence afford ground enough for believing, that the ancient family usage, whether legally obsolete or not, might yet be operative enough in the mind of a male member of his family to lead

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him to prefer the sole ownership of a male, his conjoint owner and co-heir, with whom he had been associated in the enjoyment, and with whom the entire management had been, to what he might consider the risk of female ownership, then no sound argument derived from the mere presumed inofficiousness of the disposition, according to the general law, could be used to weaken adequate evidence as to the *factum* of the Will. In the opinion of their Lordships, it would be a rash conclusion, on the state of the evidence in this cause, to suppose that a preference of the law of *Bengal* was likely to be operative in the mind of the Testator, and without a belief in the probable existence of such a preference, where is the foundation for treating the Will as inofficious?

It is not necessary for their Lordships to decide the second issue in the view which they take of this case, which is substantially the same as that taken by the Civil Court of *Nuddea*. It is, however, necessary for them to review the evidence on this issue to some extent, in order to support the opinion already expressed by their Lordships as to the probability of a continuing attachment by the Testator, *Batooknauth*, to his original family usages.

From the admissions in the pleading, referred to by the High Court in their judgment, and from the evidence, it may be safely concluded that this family came from a part of *India* where the *Mitácshará* was and is the prevailing authority; that it came not unattended by Ministers of religion, and that it originally continued in *Bengal* its ancient law. As, at the time of that migration, the Mahomedan was the governing power, and as the Hindoos were rather connived at than sanctioned by the governing power

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in the exercise of their religion, their law was in the nature of a personal usage or custom, and it is probable that migratory families or tribes amongst Hindoos would retain their own usages.

There seems to be no reasonable ground for doubting that the office of Priest was hereditary, and derived to the existing family Priest by successors in the mode stated by the *Purohit*, whose evidence was rather laid aside by the High Court, on the ground that he might be swayed by interest, than rejected by it as untrustworthy. An adherence to family usages is a strong Oriental habit; it is in most places not a weak one, and since, generally, the love of them increases with their long prevalence, it requires no effort to believe that the retention of religious usages and customs spoken to by the Defendant's witnesses did prevail in that particular branch of the family, to which point, indeed, the *Purohit's* evidence in a most important particular, that of the performance of the *Shradh* of *Batooknauth*, is clear and direct, and on that point not contradicted by proof, for though the Plaintiff alleges, she does not prove that she performed her Husband's *Shradh*.

This, indeed, is not decisive of the question as to the devolution of property in the family by right of succession, since a family might retain its religious rights, and yet acquiesce in a devolution of property in the common course of descent of property in that district, amongst persons of the same race. But still there is in the Hindoo law so close a connection between their religion and their succession to property, that the preferable right to perform the *Shradh* is commonly viewed as governing also the question of

the preferable right to succession of property ; and as a general rule they would be expected to be found in union. Now, it is proved by the *Purohit*, the proper witness to be adduced for the purpose, that *Paresnauth* performed the *Shradh* of *Batooknauth*, and that proof is not opposed by counter proof.

It is a fact, which, unexplained, bears strongly on the question of the right to the succession being under the *Mitácshará*. The High Court considered the evidence to be nearly balanced, so far as the evidence, exclusive of the judicial proceedings hereafter to be referred to went ; but it is to be observed, that the High Court, without any sufficient reason assigned, set aside the evidence of the *Purohit*, which, if it be regarded as the uncontradicted evidence of the appropriate and ordinarily adequate witness to the performance of a *Shradh*, by establishing the performance of the ceremony by *Paresnauth*, should have inclined the scale in favour of that side, especially when it is remembered that a presumption existed in favour of the continuance of the ancient family custom.

Their Lordships are relieved from the necessity of considering, whether the High Court did, or did not, attach undue weight to the proofs on which they mainly rested their judgment on this point ; since the question now to be considered by their Lordships is only, whether the Will was inofficious. The High Court proceeded on the ground, that the judicial proceedings which they rely on, and state in their judgment, and which are set forth in the Respondent's case, show that the family had for some generations recognized the law prevalent in *Bengal* as that of their succession. The High Court

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had no explanation given to it of these proceedings. It certainly lay on the Defendants to give that explanation. Possibly *Paresnauth* might have been able to show that no actual enjoyment according to such title by record had ever obtained in his branch of his family; and might have shown that he, as a party to the suit, had not advised or suggested that form of procedure and joinder of parties, and was not conscious of the effect of it, as evidence to rebut the continuance of a family custom; but whatever weight may attach to such suggestions when made and established by proofs, it is not the duty of a Court to suppose them. It suffices to say, that the decision on this issue of the High Court, on the evidence in this cause, may be correct; yet, their Lordships cannot derive from such evidence, viewed in connection with the other evidence in the cause, that belief which would justify them in treating the Will as *primâ facie* improbable, because inofficious, and inofficious because regardless of the ordinary preferences of Hindoos of the *Bengal* Schools.

Their Lordships proceed now to the consideration of the evidence as to the *factum* of the Will itself. It must be remembered that *Paresnauth* is dead, and that imputations are cast on him after his death, which he might have been able, and which his representatives in this suit may be unable, to reject, at least with equal success. Therefore, a Court of Justice should be careful to see that no inference be raised against the title which he asserted, and proved, and under which he obtained and retained possession during his life unopposed, unless it be such as the evidence in the cause clearly warrants. The evidence as to the *factum* itself in the judgment of both

Courts appeared satisfactory. It is declared by the High Court to have been "precise enough on the main points of execution and signature, and to exhibit no signal discrepancies." In an ordinary case, even on proof of a Hindoo Will, such evidence would be deemed adequate; and it must be remembered, that this Will was very soon after its execution publicly exhibited in Court, and submitted to some investigation and proof, and was proved; and that, though proved *ex parte*, yet such proof followed on the notifications which ordinarily must be taken to give due notice of a claim under a Will.

If, then, no discrepancy of any material character be found between the proof which was given on the application for a certificate in 1853, and that given on the trial of the cause in 1859, the witnesses being native witnesses, and speaking again to the same facts after so long an interval, the absence of such discrepancy, and the precision of the statements as to the execution and signature, are some arguments in themselves in support of the truth of that to which those of the witnesses who were examined on both trials depose. One discrepancy, however, is noticed in the Respondent's case on which much stress was laid by Mr. *Cave* in his able argument for the Respondent.

The witnesses at the earlier judicial investigation described the Will as having been immediately dictated by the Testator to *Denonauth*, the Writer; whereas at the trial of this cause, they depose that *Tanuckanauth* made the draft from the dictation of the Testator, and that *Denonauth* made a fair copy from it. This discrepancy certainly exists, but it is one which might be found in many a case free from

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suspicion. It may have proceeded from mere inaccuracy of recollection; and sometimes in native statements an intermediate agency is passed over, and an action ascribed to an immediate source, which in truth proceeded from a derivative one. The reason assigned by the Respondent's Counsel for this variation of story is little probable. Had the witnesses for the Will recollected the evidence which they gave on the first trial, they, if false witnesses, would have adhered to it. They are not likely on the trial to have made intentionally their evidence conformable to that of the Respondent's witnesses who were examined before them, for no draft was produced at all; nothing was shown to which they were likely to desire to make their account conformable. The transaction to which they deposed, and that to which the Plaintiff's witnesses were deposing were utterly irreconcilable, and no motive could have existed for injuring their own story by taking up a part of that of the rival witnesses. Their Lordships, therefore, concur in the view taken of the evidence as to the *factum* of the Will by both Courts, that it was in itself adequate to the proof of an ordinary Will. Was the internal evidence against it, and was the internal improbability of the Will sufficient to discredit it?

No inherent improbability can be stated as to this Will, or its provisions, unless by assuming either that the law of the *Mitácshará* was known to the Testator to be clearly applicable, or that a preference in the female line of descent was likely to be influential in his name. Their Lordships, therefore, put aside these speculations and apply themselves to the consideration of the evidence in the cause. The grounds

upon which the judgment of the High Court proceeds as to the Will are, that the witnesses to it are not such as they would have expected to find attesting his Will; that the handwriting of the Testator seems too firm for one suffering from such a sickness; and that if the *Mitácshará* prevailed, the Will would be needless; that Rs. 25 per month was an absurdly small allowance for the Widow; that there was no hint of any disagreement between him and his Wife; and they conclude by observations derived from these matters as to the improbability of the case. But to these reasons it may be answered, that the Rs. 25 which are given only in case of the Widow leaving the family house, may not have been meant to measure her maintenance whilst resident; that it may have been designed *in pœnam* to enforce residence in the family house; that there was much conflict of evidence, and may have been room to doubt whether the *Mitácshará* did or did not prevail in the family as the authoritative exposition of their law; that there had been that compliance with the rules of procedure in the Courts of the District, and such apparent admissions on record, inconsistent with the prevalence of the *Mitácshará* as an authority, which might, unless explained, altogether destroy a custom by breaking in upon its continuance; and that these things might suggest to his own mind, or the minds of those about the Testator, the wisdom of not relying on the usage alone; that the Testator's imputed neglect of the pecuniary interests of his Widow, is no greater than that which belongs to any follower of the *Mitácshará* school, who, having the power to separate from an united family, and so to qualify his Widow as an heiress, prefers to let the law

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of his class take its course. And, as to the strength of the signature; that two days and part of a third intervened between the execution of the Will and the death; that though weakened by illness, the Testator may have rallied his strength to the performance of that short act of signature. As to the character of the witnesses; that the family Priest was an attesting witness to the Will, and that such an attesting witness might well be supposed, by those at least who placed confidence in him, to be sufficient to save the Will from the objection of being attested only by persons unconnected with the family, or too low to give support to such an instrument, whilst the known aversion of persons of respectable position to be connected with cases likely to be the subject of litigation may be one reason why attesting witnesses to Hindoo Wills are seldom found to be of a class from which it would be most desirable to select them.

The case of the Defendants certainly derives some support from the failure of the case made as to the forgery of the Will.

Though the youth and dependent state of the Plaintiff herself may be admitted to afford very cogent reasons for not pressing against her those presumptions of acquiescence which similar conduct in a competent adult would give rise to, yet presumptions from the conduct of others cannot, as it has been said, be excluded from the consideration of this case, when the probabilities on either side are weighed.

During the whole of *Paresnauth's* life, no attempt was made by any one to question the validity of this Will. Is this consistent with a belief in the family that the Widow was the heiress of her Husband? It is not alleged that he shared the proceeds with the

Widow. Could it have been unknown generally to the family and inmates of the house, and those most conversant with the family business, that he was dealing with the property as sole beneficial owner? According to the case of the Widow, she immediately on her Husband's death became entitled to the usufruct for her life of a considerable estate. Could that be a matter of slight moment to her immediate family? Would there not have been a considerable difference in the estimation of her by others as an heiress, instead of being one entitled merely to a moderate maintenance out of the wealth of another? Yet, according to the statement of herself, two and a half years of silence and uncomplaining, non-participation in profits, ensue, not only on her own part, but also on the part of her Father and others, who, knowing her youth and incompetence to the management of business, would be naturally expected to be on the alert to watch over her interests, and to share, in some degree, it may be, in the fruits of her succession. The Will was proved in the ordinary mode; there is no proof of any alteration in the ordinary mode of notification, which must be viewed as ordinarily adequate to give knowledge where knowledge is proper to be given. The notification is said to have been on the house and on the property, yet the whole of the Plaintiff's own family, including herself, is in ignorance until after the lapse of two and a half years from the date of an ordinarily sufficing notification.

Is it reasonable to suppose that *Paresnauth* could stifle all inquiry, and keep secret from the family, that he had proved a Will publicly, inofficious as it is alleged, and disinheriting a Wife, an expectant

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heiress, between whom and her Husband the ordinary friendly relations existed? Such an entire state of ignorance, so improbable, and of such long duration, it is most difficult to suppose possible. We find it asserted strongly for the Plaintiff, but, unfortunately, her case is not free from statements, some of which, as to the violence designed against her, seem to be most improbable, one of which, the instrument with the power of adoption, has been abandoned, and another, viz., the proof of the forgery, discredited. She herself, young and inexperienced, is probably not in any way answerable for the management of her own case; but the case, as pleaded, relative to the forgery of the Will, is discredited by both Courts, and contains such improbable statements as fully to justify their rejection of it. Again, the statement of the Plaintiff as to the instrument which accompanied the permission to adopt a Son, which she alleges that she received, though not improbable in itself, bears still the semblance of an invented story. Her conduct in this matter is not in the least degree consistent with probability nor with duty. If that instrument was prepared, why was it suffered to remain unacted on? If destroyed, as she alleges, by *Paresnauth*, why should that destruction have prevented proofs of its existence and of the spoliation? Was it not her duty to make the adoption, according to her so urgently recommended, that the permission provided for five acts of adoption in succession on failure of each preceding one? If, then, the Court finds itself compelled to discredit these allegations, what rational ground has it for reposing confidence even on the story of her own continued ignorance, during the lifetime of *Paresnauth*, of any title

adverse to her own? In a suit not instituted by *Paresnauth*, but which was instituted hostilely to him, to set aside a certain *Putnee* tenure, which suit affords not the slightest ground for a supposition that there was any collusion with him in it, he is found pleading the Will, and she repeating that title and praying, therefore, to be dismissed from that suit. *Paimâ facie*, at least, credit must be given to that pleading, that it proceeds from one who was qualified to represent her. Is the contrary proved? Is any one called to show how that answer came to be filed? *Paresnauth* is dead; and, after his death, is it to be presumed that he put her answer, without her authority, on record; that is, that he committed a fraud on the Court, and continued a fraud on her? A Court should not impute fraud; and, after the death of *Paresnauth*, nothing should be supposed to his prejudice for which there is not a legal foundation.

Their Lordships, therefore, on a review of the grounds on which the High Court has held this Will not proved, are compelled to say, that they think that Court laid no foundation for treating the Will as inofficious in itself, for disregarding the evidence of the *Purohit*, or for ascribing the answer of the Widow to the deceased *Paresnauth*. The Will had been proved, though *ex parte*; it had been acted on very recently after the Testator's death, possession held for a considerable time under it. There appears to have been no desire on the part of *Paresnauth* to escape from the publicity and responsibility attending the proof of such a document. In fact, it was not drawn into question so long as *Paresnauth* himself lived. That apparent acquiescence is attempted to be ascribed to a general and enduring

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ignorance, which is in itself eminently improbable. The Will is met by distinct allegations of fraud and forgery, the witnesses to which are discredited by both Courts. Besides this, the case of the Plaintiff does, in the several parts of it before commented on, bear the appearance not simply of exaggeration, but of conscious untruth. Whatever might have been the result of this case, had these presumptions in support of the case for the Will been wanting, the ordinary support which the failure of an opposing case lends to the case, which it impeaches, with the presumptions arising against the opposing case from the introduction into it of matters too grossly improbable for belief, and not the subject of innocent mistake, must be applied, on a review of the whole evidence in the cause, to support the *factum* of this Will. Their Lordships think, therefore, that the decision of the High Court must be reversed with costs, and that the decision of the Civil Court of *Nuddea* should be restored and affirmed, and that the Appellants should have the costs of this appeal; and they will humbly certify their opinion to Her Majesty to the above effect.

NOGENDER CHUNDER GHOSE and } *Appellants*;
 MOHUMDER CHUNDER GHOSE ... }

AND

MAHOMED ENSUFF and others ... *Respondents*.*

*On petition from the High Court of Judicature at
 Bengal.*

THIS was an application for special leave to appeal from a decree of the High Court, and a judgment or Order made on review of judgment, under the following circumstances :—

The petition set forth, that in the year 1861 the Petitioners, *Nogender Chunder Ghose* and *Mohunder Chunder Ghose*, instituted a suit to establish their rights as *Zemindars* to certain alluvial lands which had been taken possession of by the Defendants on a claim of right thereto as proprietors of other land in the vicinity : that a plea of limitation was put in by the Defendants in bar of the suit, and a decree made by the Judge of the *Zillah Chittagong*, in favour of the Defendants, which decree having been appealed from by the Petitioners to the High Court of Judi-

24th Feb.,
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Pending proceedings before the High Court on an application for a review of judgment, that Court altered the then prevailing practice of permitting an appeal within six months from the date of the judgment allowing or refusing a review. In such circumstances, the six months prescribed by the Order in Council of the 16th of April, 1838, from

* Present :—Members of the *Judicial Committee*—The Right Hon. Sir William Erle, the Right Hon. Sir James William Colville, and the Right Hon. Sir Robert Phillimore.

Assessor :—The Right Hon. Sir Lawrence Peel.

the date of the decree having expired, special leave to appeal from the original decree and the Order refusing a review was allowed.

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cature in *Bengal* was reversed, and an Order made remanding the case to the *Zillah* Court for re-trial on the merits: that the suit was accordingly re-tried by the Judge, who, on the merits decreed in favour of the Petitioners, giving them possession of the alluvial lands: that the Defendants being dissatisfied with this last-mentioned decree, appealed against the same to the High Court: that the hearing of the appeal took place before a divisional Bench of the Court, on the 1st of *December*, 1865, when a decree was made, reversing the decree of the *Zillah* Judge, and dismissing the Petitioner's suit: that the Petitioners, within the ninety days prescribed for that purpose, filed a petition in the High Court, praying for a review of the decree of that Court, instead of filing a petition in the Court for leave to appeal to Her Majesty in Council against the decree, the Petitioners being advised that, according to the prevailing practice of the Court, they would have six months to file such a petition of appeal, should it become necessary, from the date on which the Order on the petition of review might be pronounced, such practice having been established by a decision of the High Court, made on the 8th of *July*, 1864; that the petition for review came on for hearing before Mr. *Seton Karr*, on the 17th of *May*, 1866, who, by his Order of that date, directed the case to be re-argued on one of the points taken. That accordingly, a re-hearing of the appeal on a review of judgment came on before Messrs. *Seton Karr* and *Kemp*, two of the Puisne Judges of the Court, on the 1st of *April*, 1867, when the Court, by its decree affirmed the former decree of the High Court of the 1st of *December*, 1865; that on the unsuccessful result

of the re-hearing on review being communicated to the Petitioners, they directed a petition to be filed in the High Court for leave to appeal to Her Majesty in Council : that the Petitioners were then informed, that the practice had been altered by a decision of the High Court on the 11th of *September*, 1866, and passed while the above proceedings on review were pending : that the Petitioners presented a petition to the High Court, stating the principal facts above mentioned, and the change of practice, and further stating, that inasmuch as a period of six months allowed by law for filing Privy Council appeals against the decision of the Court had expired, from the original judgment of the 1st of *December* 1865, and as the above delay could not in the least be attributed to the Petitioners, who had acted on the full belief that their appeal to *England* would be in time under the former precedents of the Court, and as it would be very hard and unjust to bind parties by subsequent decision, over which they had no control, and whose effects they could not possibly foresee ; therefore, under these peculiar circumstances, the Petitioners prayed to be allowed to file their appeal to *England*. That the petition came on for hearing before Mr. *Jackson*, one of the Puisne Judges of the High Court, on the 29th of *June*, 1867, when he recorded the following minute or Order :—" I am unable to grant this application. The Petitioner must apply to the Privy Council direct ;" that the Petitioners had, under the above circumstances, been obliged to present their petition to Her Majesty in order that justice might not miscarry, and that the Petitioners might not be prejudiced by losing their

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right of appeal by reason of the alteration in the practice of the High Court; and the Petitioners submitted, that they ought to be allowed to appeal against the decree of the High Court of the 1st of *December*, 1865, the time intervening having been occupied by the proceedings in the review of judgment, as the Petitioners would have obtained leave of the High Court so to appeal on the termination of such proceedings as a matter of course, if the then established practice of the Court had continued, inasmuch as the decision changing the practice was not passed until after the expiration of six months, calculated from the date of the decree, so that the Petitioners had no opportunity of presenting their petition for leave within that period; and the Petitioners submitted that, the judgment and Decree of the High Court, dated the 1st of *April*, 1867, was a full and complete hearing of the appeal, on a review of judgment previously granted, and that although it in terms affirmed the former decree of the 1st of *December*, 1865, yet it ought to have been considered and treated as the final judgment or decree of the High Court made in the appeal, and from such a judgment or decree Her Majesty's Charter, establishing and constituting the High Court, ordained that any person or persons might appeal to Her Majesty's Privy Council, provided that leave be applied for to the High Court within six months from the date of such judgment or Decree, and that with that proviso the Petitioners had substantially complied by filing in the High Court, and within such prescribed time, their petition; and they prayed for special leave to appeal against the decree of the High Court bearing date the 1st of *December*, 1865, and also

against the other judgment or decree affirming the same and bearing date the 1st of *April*, 1867.

Mr. *Leith*, for the Petitioners.

The six months allowed by Order in Council of the 16th of *April*, 1838, for appealing from the decree of the 1st of *December*, 1865, expired pending the proceedings for review. There is no question of the right of the Petitioners to appeal from the decree of the High Court, but for the alteration in the practice by the decision of the 11th of *September*, 1866, which took the Petitioners by surprise and operated, in the circumstances, as a denial of justice. This change in the practice of the Court took place after the expiration of the six months from the date of the decree. The Court, I submit, was wrong in refusing leave to appeal from the judgment on review, and such decision was in opposition to decided cases. Thus in *Nezeer Ali Khan v. Rajah Ojoodharam Khan (a)*, it was held, that an Order of the High Court refusing an application for a review was a final Order from which an appeal lies. So in the *Maharajah of Burdwan's* case (*b*), it was laid down, that where an application for a review is admitted, the decision upon the re-hearing is a final decree from which an appeal will lie, and which dates from the time.

The Right Hon. Sir JAMES W. COLVILE.

Their Lordships think, that in the circumstances disclosed in the petition, special leave to appeal from the decree of the High Court of the 1st of *December*,

(a) 1 Cal. W. R., 14 (Miss. Appeals).

(b) 2 Rev. Civil & Com. Rep., 260.

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1865, and the judgment or order of the 1st of *April*, 1867, ought to be allowed. In the cases referred to, the Court have laid it down, that if there is a decision upon a review of judgment, that decision is to be considered the final decree.

PESTONJEE NUSSURWANJEE ... *Appellant* ;

AND

MANOCKJEE & CO. ... *Respondents.**

On appeal from the High Court of Judicature at Madras.

2nd & 3rd
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 Jurisdic-
 tion of the
 Courts in
India, under
 the 326th
 section of the
 Code of Civil
 Procedure,
 Act, No. VIII.
 of 1859, to
 direct agree-
 ment of
 parties to ar-
 bitration to
 be made a
 rule of Court.

THIS appeal was brought from three Orders of the High Court of Judicature at *Madras*. The first Order was dated the 15th of *January*, 1866, and dismissed an appeal from three Orders of the Civil Court of *Calicut*, dated the 22nd and 23rd of *Sep-*

* Present :—Members of the *Judicial Committee*—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Lord Chief Baron (the Right Hon. Sir Fitz-Roy Kelly.

Assessor :—The Right Hon. Sir Lawrence Peel.

According to the true construction of the 326th section of the Civil Procedure Code, when parties have agreed to submit the matter to arbitration of one or more Arbitrators, no party to the agreement can revoke the submission to such arbitration, unless for good cause; a mere arbitrary revocation of the authority will not be permitted.

tember, and 20th of *October*, 1865, respectively, which directed that an agreement to submit matters in dispute to arbitration should be filed and enforced under the provisions of section 326 of the Civil Procedure Code of *India*, Act, No. VIII. of 1859 (a). The second Order bore date the 7th of *January*, 1867, and dismissed an application for leave to appeal against a decree of the Civil Court of *Calicut*, dated the 9th of *February*, 1866, affirming an Award in favour of

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(a) Sec. 326 is in these terms :—"When any persons shall by an instrument in writing agree, that any differences between them, or any of them, shall be referred to the arbitration of any person or persons named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto, or any of them, that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the Applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. . . . If no sufficient cause be shown against the agreement, the agreement shall be filed and an Order of reference to arbitration shall be made thereon. The several provisions of this chapter, so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an Order of reference made by the Court, and to the Award of arbitration, and to the enforcement of such Award."

A. & B., two partners, agreed to submit certain differences to arbitration. The Arbitrators entered into consideration of the matters referred to them, and gave a preliminary decision, which the parties to the arbitration submitted to and acted on, as, however, the Arbitrators could not agree upon all the points referred to them, they were requested by *A.* to make their Award within ten days, or to appoint an Umpire. Some delay took place in the appointment of the Umpire, when *A.* sent notice to withdraw from the arbitration and cancel the agreement, upon which *B.* applied by petition to the Court, under the 326th section of the Civil Procedure Code, to make the submission to arbitration a rule of Court, which was ordered. Held, that it was not in the power of *A.* at his mere will and pleasure to revoke the authority of the Arbitrators, in whose appointment he had concurred, and had acquiesced and acted upon their preliminary Award.

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Respondents. The third Order appealed from was also dated the 7th of *January*, 1867, and dismissed an application for leave to appeal against an Order of the Civil Court of *Calicut*, dated the 6th of *October*, 1865, confirming the appointment of an Umpire.

The question on the appeal was, whether the Civil Court of *Calicut* had jurisdiction, under section 326 of the Civil Procedure Code of *India*, to file the agreement to refer to arbitration after the Appellant had withdrawn his submission.

The circumstances of the case were these :—

The Appellant and the Respondents were, with others, co-partners in the transactions of the farms of the *Talook Calicut* and of other *Talooks* in the *Malabar* district. This partnership, however, was closed by paying out the other co-partners, and a new partnership for the same concern entered into in 1863, between the Appellant and the Respondents. Shortly afterwards, disputes having arisen in regard to the co-parcenary transaction of the farms in question, a *Karar*, or agreement, dated the 10th of *June*, 1864, was entered into by the Appellant and Respondents, to refer certain differences touching a sum of Rs. 44,000, alleged to be due to the Respondents in respect of the *Abkbari* farm at *Calicut*, and other transactions to arbitration under section 327 of the Civil Procedure Code.

The original Arbitrators appointed were Mr. *Pierce* and Mr. *Bates*; but Mr. *Pierce* going to *England*, Mr. *Punnett* was appointed an Arbitrator in his place.

The Arbitrators entered into consideration of the matters referred to them, and on the 15th of *July*, 1864, gave a preliminary decision dissolving the partnership which had subsisted between the Appellant

and the Respondents, but reserved to themselves, as Arbitrators, the power to give a final decision as to the terms of dissolution after full examination of the accounts. This decision was acted on by the Appellant and the Respondents, and the partnership dissolved, the business of the partnership being from that date carried on by the Appellant alone.

On the 13th of *May*, 1865, the Arbitrators passed a resolution, that the Respondents should purchase the outstandings of the *Ponany* farm, amounting to Rs. 5,073. 5a. at 50 *per cent.* of their nominal value with Rs. 2,536. 10a. 6p. The Arbitrators further gave minutes (Mr. *Punnett* on the 6th of *July* and on the 25th of *August*, 1865, and Mr. *Bates* on the 5th of *August* and 7th of *September*, 1865) of proceedings expressing their respective opinions in writing on the different disputed items, but came to no final decision.

On the 24th of *July*, 1865, the Appellant wrote a Letter to the Arbitrators, requiring them to make their Award within ten days, or to appoint an Umpire. The Arbitrators did not make a final Award within that time, and shortly after the receipt of this Letter appointed Mr. *Schlunk* as Umpire.

On the 5th of *August*, 1865, the Appellant sent a notice to the Respondents whereby he purported to cancel and withdraw from the agreement, and on the same day sent a notice to the Arbitrators to the same effect.

In consequence, the Respondents, on the 23rd of *August*, 1865, filed a plaint in the Civil Court of *Calicut*, to have the agreement for submission, dated the 10th of *June*, 1864, filed under section 326 of the Civil Procedure Code. Notice was given to the Appellant

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to show cause why the agreement should not be filed, and cause was shown by him.

On the 22nd of *September*, 1865, the Civil Court ordered the agreement for submission to arbitration to be filed under section 326, of the Civil Procedure Code, and that the Appellant should be assessed with the costs of the application in the Arbitrators' Award. The reasons for this decision were, first, that the Arbitrators had made two decisions on matters progressing towards the final Award, and that the parties had agreed to, and taken immediate action on, those decisions; and, secondly, that the Appellant had no right to cancel the agreement, under the circumstances; and on the 23rd of *September*, 1865, the Civil Court made an Order, directing the Arbitrators to make their award, and empowering them to appoint an Umpire.

On the 6th of *October*, 1865, the Civil Court made an Order, affirming the nomination of Mr. *Schlunk* as Umpire, and on the 17th of the same month the Umpire made his Award.

The Appellant appealed to the High Court at *Madras* from the above Orders of the 22nd and 23rd of *September*, 1865, and the 20th of *October*, 1865, on the following grounds:—First, that all such Orders were *ultra vires* and of no legal force; second, that the Civil Judge had no jurisdiction to file the agreement upon which the appointment of the Arbitrators and the Umpire was constituted; third, that there was, in fact, no subsisting agreement at the date when the Civil Judge filed such agreement; fourth, that the Order of reference, made on the 22nd of *September*, 1865, was altogether illegal, made without any authority, and the Order and all pro-

ceedings thereunder were of no legal force or effect whatever; and lastly, that the appointment of the Arbitrators and the Umpire was illegal, made without any authority, and of no legal force or effect whatever.

On the 15th of *June*, 1866, the High Court dismissed the appeal.

The following reasons were recorded by the Court, consisting of Mr. Justice *Holloway* and Mr. Justice *Innes*, for dismissing the appeal:—"The Appellant having asked and obtained permission to appeal to Her Majesty in Council from the Order of this Court, dated the 15th of *January*, 1866, we are now required by the Letters Patent to record the reasons for the Order made by us, dismissing the appeal. The decision of this Court was simply, that no appeal lay from the Order of the Civil Judge of *Calicut*, directing that an agreement to submit matters in dispute to arbitration should be filed under the provisions of section 326 of the Civil Procedure Code. It is quite clear, that the section itself gives no appeal, and it was not attempted to show that any other part of the Code had done so. The appeal was put solely upon the ground, that the Civil Judge had, in filing the agreement to submit, acted altogether without jurisdiction, because, previously to the filing, the present Appellant had withdrawn from the submission. The language of section 326 shows, that the Judge had jurisdiction to hear and determine the sufficiency of the cause shown against the agreement, and if no sufficient cause was shown against the agreement, he was bound to file it, and make an Order of reference to arbitration. After the filing, the other provisions of the chapter, so far as they are not incon-

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sistent with the terms of the agreement, became applicable, and the matter would proceed naturally to a final judgment. These sections give the amplest power to enlarge the time for making the Award, to nominate other Arbitrators, to correct and remit the Award, and to set it aside on the grounds of corruption or misconduct. It is manifest, therefore, that the section under which the Civil Judge acted gave him jurisdiction, and there being no part of the chapter or of the Code giving an appeal against such an Order, we were bound to dismiss the appeal. As the matter, however, was of very general importance, we proceeded to consider, whether the fact that one of the parties had chosen to withdraw his submission was such a cause against the agreement as should have prevented the Civil Judge from filing the agreement. The section provides for two cases, one, in which all the parties join in the application, and the other, in which they do not. In the latter case, the only one with which we are at present concerned, the applicant is to be treated as the Plaintiff, and the other parties as the Defendants in a suit. Notice is to be given to them to show, within a time specified, why the agreement should not be filed, and it proceeds:— 'If no sufficient cause be shown against the agreement, the agreement shall be filed, and an Order of reference to arbitration be made thereon.' Taking these words alone, it could scarcely be contended, that sufficient cause is shown against any agreement, by one of the parties to it saying, that he has since altered his mind. What, moreover, could be the purpose of the Legislature in providing for the showing of cause, and the determination of the sufficiency or insufficiency of that cause, if any one of the parties could put an end to

the matter by simply saying, 'I have altered my mind. It is true, that I entered into the agreement, I have nothing of fraud, surprise, or invalidity to allege against it, but I have since altered my mind.' We should, therefore, have no hesitation in saying, if the matter were before us on appeal, that one of the parties having altered his mind is not a sufficient cause against an ordinary agreement, and we can see no possible ground in legal principle for saying, that it is sufficient cause against an agreement to refer matters to arbitration. It was said in the argument, that by the withdrawal of one of the parties, the agreement was absolutely at an end, and that there was nothing to file. This has very often been rather loosely said in the English Courts; but the case of *Livingston v. Ralli* (5 El. & B., 132) has effectually disposed of that doctrine. All the learned Judges there decided, that an action will lie upon the breach of an agreement to refer prospective differences to arbitration, and Mr. Justice *Coleridge* took occasion to express strong doubts as to the correctness of the opinion frequently expressed, that nominal damages only could be recovered. This decision, unquestionably in accordance with principle, shows that there is no pretence for saying, that by English law the agreement becomes, by the withdrawal of one of the parties, a mere nullity. There is no doubt whatever, that an English Court of Equity will not decree the specific performance of an agreement to refer. *The South Wales Railway Company v. Wythes* (5 De G. Mac. & Gor., 887) contains a re-assertion of this principle, frequently stated by Lord *Eldon*. Both Courts of Law and Equity have refused to allow their jurisdiction to be stayed on account of such agreements. *Street*

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v. *Rigby* (6 Ves., 814), overruling Lord *Kenyon's* decision in *Halfhide v. Fenning* (2 Bro., C. C. 336), is the first case in which this was distinctly decided in equity. *Thompson v. Charnack* (8 T. R., 139) is the leading case at law. Without saying anything upon the policy of these decisions, it may perhaps be doubted, whether they would have been arrived at, if the point had come for the first time before the majority of the Judges and the Law Lords who decided *Scott v. Avery* (5 H. L. Cases, 811). In *England*, the Legislature has, by various Statutes, sought to render such agreements to refer effectual; and Mr. Baron *Martin*, in the very recent case of *Mills v. Bayley* (2 Hurls & Colt, 36, 41), took occasion to express his regret that the Legislature did not in all cases prohibit the revocation of agreements to refer. Perhaps the reasons given by Lord *Coke* in *Vynior's* case (8 Co. Rep., 81 b.), will not be found very satisfactory in point of logic for permitting the revocation. In truth, however, it is difficult to see what the Courts of law could have done. They did not specifically perform any contract, and the proceeding by attachment, both at Law and Equity, proceeded upon the ground of a contempt of the Court of which the agreement to submit had been made a rule. It is of course difficult on principle to see why a withdrawal should have been allowed after the submission had been made a rule of Court. The question of how the agreement shall be enforced is of course a question of procedure. The Courts of Equity in *England* have always considered specific performance a peculiar and discretionary remedy, and the mere refusal on their part to specifically perform a contract to submit disputes to arbitration, is no authority whatever for

putting upon section 326 and the other sections of this chapter, the construction, that nothing more is to be done under them after the dissent of one of the parties from his own agreement. It seems to us that such dissent is no better cause against this sort of agreement than it is against any other, and if there had been an appeal we should, unquestionably, have decided that the Civil Judge was right in filing the agreement. The Indian Legislature, in the provisions of this chapter, seems to have been guided by the same policy as the English, since the time of *William III.*, but has carried out that policy to its logical conclusion."

This was the principal decree appealed from.

The Appellant afterwards filed a petition in the Civil Court at *Calicut*, alleging the invalidity of the Award, and praying that it might be set aside on the ground of misconduct of the Arbitrators. The Court rejected the petition as not being presented within the time required by section 324 of the Code. After other applications to the Court, the appeal from the Orders before mentioned were allowed, and now came on her hearing.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

In law, the Appellant was competent to revoke the submission to arbitration, and did in fact revoke the same by notice to the Arbitrators; and, therefore, the subsequent decree or Order of the *Zillah* Judge, ordering that the agreement containing the submission should be filed in Court, or making the same in effect a rule of Court, was erroneous, and, consequently, all the subsequent proceedings of the Court

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based thereon were illegal, null, and void. The Order of reference to arbitration made by the Court, under section 326 of the Civil Procedure Code (Act, No. VIII. of 1859), being founded thereon, was also null and void. The Appellant, by his notice, of the 24th of *June*, 1865, limited the time to ten days, within which the Arbitrators were to make their Award, and their powers and functions ceased absolutely on the expiration of the time, consequently the subsequent act in appointing an Umpire was invalid. *In re Salkeld and Slater* (a). If the appointment was valid, the proceedings are irregular, as the Umpire should have opened the matter up from the beginning. At Common Law, revocation can be made at the instance of either party, *Russell* on Awards, p. 143 [3rd Ed.], even after the submission has been made a rule of Court, *Milne v. Gratrix* (b); *King v. Joseph* (c). The Common Law principles as to revocation are illustrated in *Vynior's* case (d), which is the law at the present day, unless modified by Statutes. The 9th & 10th *Will.* III. c. 15, provides, first, for making the submission to arbitration a rule of Court; and, second, by inserting a clause in the submission agreeing thereto. The 3rd & 4th *Will.* IV. c. 42, sec. 39, enacts, that such agreement shall not be revocable without leave of the Court; so by the 17th & 18th *Vict.* c. 125, sec. 17. In *Mills v. Bailey* (e), which was an action on an Award, and the Defendant pleaded that before it was made, he had revoked the Arbitrator's authority: the Court held the plea good and the submission revocable, so far as related to one

(a) 12 Ad. & El., 767.

(b) 7 East., 607.

(c) 5 Taunt., 452.

(d) 8 Co. Rep., 81, b.

(e) 2 H. & C., 36.

of the matters referred. The decree of the *Zillah* Judge, dated the 9th of *February*, 1866, adopting and incorporating the terms of the Award, purporting to have been made under and in pursuance of section 326 of the Civil Procedure Code, is illegal ; first, because the original Order of the Judge of the 22nd of *September*, 1865, failed to give jurisdiction and power to the Judge to order the reference, and to make such decree ; and, secondly, because not only was the Umpire not duly appointed to act between the parties to the reference, but his Award was invalid. Lastly, the decree of the High Court of the 15th of *January*, 1866, was erroneous in dismissing the appeal, on the ground that no appeal lay to the High Court from the Order of the *Zillah* Judge, made on the 22nd of *September*, 1865, under section 326 of the Code.

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Mr. *Coleridge*, Q.C., and Mr. *Mackeson*, Q.C.,
for the Respondents.

Under the Civil Procedure Code, no appeal lay from the Order of the Civil Court of *Calicut*, directing the agreement to refer to arbitration the matter in dispute, to be filed under the provisions of section 326 of the Code. The Civil Judge had jurisdiction under that section to order the agreement to be filed, and to enforce the same, notwithstanding the Appellant desired to withdraw his submission, Civil Procedure Code, secs. 325-332. This case materially differs from *Sheonath v. Ramnath* (a), where it was held, that the Court could not, under the provisions of the 312 and 314 sections of the Act, No. VIII. of

(a) 10 Moore's Ind. App. Cases, 413.

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1859, as in force in *Oude*, refer the decision of an issue raised in a suit to Arbitrators nominated by the Court against the protest of one of the parties. Here the submission was at the instance of the parties themselves. But a stronger ground is, that the Appellant having availed himself of the preliminary decision of the Arbitrators, and acted on it, cannot afterwards repudiate their authority, or the agreement to refer. An agreement to refer to arbitration cannot be treated as a nullity by the withdrawal of one of the parties. Neither can a party partially revoke a submission, after an intermediate Award, as in this case; *Harcourt v. Ramsbottom* (a); and a Court of Equity, if there has been part performance, would enforce the agreement, *Cooke v. Cooke* (b). The Statute, 3rd & 4th Will. IV. c. 42, does not extend to *India*, but even if it did, that Statute leaves it with the Court to revoke the submission. The rule of English law, as expounded by the Court below, is that the Court will not allow a party to revoke, *Vynior's case* (c); *Livingston v. Ralli* (d); *Pope v. Lord Duncannon* (e). Statutes, 9th & 10th of Will. III. c. 15, sec. 10, and the 17th & 18th Vict. c. 125.

Sir R. Palmer, Q. C., in reply.

In *Cooke v. Cooke* (f) the Vice-Chancellor Wood held, that where in a reference under the Arbitration Act, 9th & 10th of Will. III. c. 15, an Award has been made, the jurisdiction in the matters of the Award of every superior Court, except that before

(a) 1 J. & W., 505, 511.

(c) 8 Co. Rep., 81, b.

(e) 9 Sim., 177.

(b) Law Rep 4 Eq., 77.

(d) 5 El. & B., 132.

(f) Law Rep. 4 Eq., 77.

which the reference is pending, is excluded. A Court of Equity would not specifically enforce such an agreement, *Vickers v. Vickers (a)*.

Their Lordships' judgment having been reserved, was now pronounced by

The Right Hon. Lord ROMILLY.

This is an appeal from three Orders of the High Court of Judicature at *Madras*. The question, in substance, is, whether the Award of Mr. *Schlunk* settling matters in difference between the Appellant and the Respondent is valid and binding on the parties. The facts which raise the question may be stated very shortly.

On the 29th of *October*, 1863, the Appellant and Respondent entered into a partnership in certain farms, of taxes imposed on spirituous liquors within certain Districts in the Presidency of *Madras*. The Appellant was to supply the capital required, and the Respondent was to manage the business. Certain differences arose between them; and they agreed that Arbitrators should be appointed to settle these differences. Accordingly, this was done by an agreement in writing for submission to arbitration, bearing date the 10th of *June*, 1864. Originally, Mr. *Pierce* and Mr. *Bates* were appointed Arbitrators, but Mr. *Pierce* refusing to act, Mr. *Punnett* was appointed in his place. The terms of the agreement are to this effect :—

“Know all men by these presents, that we the undersigned, *Pestonjee Nesserwanjee*, of the firm of *Framjee Nesserwanjee & Co.*, and *D. Manockjee & Co.*, do make, constitute, and appoint *R. H. Pierce*,

(a) Law Rep. 4 Eq., 529.

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Esq., and *W. Bates*, Esq., Gentlemen, as Arbitrators, chosen by our mutual consent, to inquire into certain controversies and differences existing between us in regard to our copartnery in the transactions of the *Abkary* Farms of the *Calicut*, *Kurumbranad*, *Palghaut*, and *Ponany Taluqs*, and *Mannur* and *Payenjanur Amshoons*, of the *Ernad Taluq*, rented from Government, giving, and by these presents granting, unto the abovesaid *R. H. Pierce*, Esq., and *W. Bates*, Esq., full power to substitute or appoint one or more Arbitrator or Arbitrators, as well as, if necessary, an Umpire ; and further, to call for and examine the Books and papers of the said copartnership, as also any party or parties connected with the farms and others, and otherwise to take all and every lawful means to arrive at a fair and impartial decision, to which we hereby mutually agree and bind ourselves to abide fully and entirely."

It contains the following Memorandum at the foot : — " N. B.—We the Undersigned, *Pestonjee Nusserwanjee*, of the firm of *Framjee Nusserwanjee & Co.*, and *D. Manockjee & Co.*, have executed this power under and in conformity with the provisions of section 327 of Act, VIII. of 1859 ; and we do hereby accordingly agree and bind ourselves to abide by the decision which the within-mentioned duly empowered Arbitrators may give under the aforesaid Act."

On the 15th of *July*, 1864, the Arbitrators made an intermediate award, dissolving the partnership, and giving the business to the Appellant. On the same day a notice, signed by both parties, was publicly given of this fact, and which stated, that all debts due to them by the *Abkary* Farm were to

be received and paid by *Framjee Nusserwanjee & Co.* and that the Respondent had no longer any interest therein.

On the 3rd of *October*, 1864, the Appellant wrote to the Arbitrators, complaining of the conduct of the Respondents relative to the making up of the accounts.

On the 13th of *May*, 1865, the Arbitrators came to a resolution, which was a second intermediate award, directing that the farm outstandings due from the *Ponany, Chowghaut, and Betatanad* divisions should be taken by the Defendant at 50 *per cent.* discount; it is in these words:—"Resolved, that the farm outstandings, due from the *Ponany Chowghaut and Betatanad* divisions, as they stood in the farm Books on the 30th of *June*, 1864, as *per* balance-sheet, be taken over by Messrs. *Dhunjeebhoy Maneckjee & Co.*, or their nominee, at 50 *per cent.* discount, they receiving credit for all sums since recovered, less any regular expenses, and paying the amount as may be hereafter decided by us."

On the 6th of *July*, 1865, Mr. *Punnett*, one of the Arbitrators, published a long written opinion on the subject of the points remaining to be disposed of by the Arbitrators under the submission to arbitration.

On the 24th of *July*, the Appellant wrote to the Arbitrators, and requested them to make their award in ten days, or that, if they were unable to do so, they would nominate an Umpire.

This was not done, and, on the 5th of *August*, 1865, the Solicitor of the Appellant wrote a Letter to the Solicitor of the Respondents, purporting to cancel the award; and he also sent in similar Letters

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to the Arbitrators. On the same day Mr. *Bates*, the other Arbitrator, gave his written opinion on the remaining points referred to therein, stating, in substance, his differences from Mr. *Punnett*.

On the 12th of *August*, 1865, a further notice was given by the Appellant, requiring the papers to be delivered up to him. Two more written opinions were given, one by Mr. *Punnett*, and another by Mr. *Bates*, the last on the 7th of *September*, 1865; and Mr. *Schlunk* (who was afterwards appointed Umpire, but who seems to have been already selected for that purpose by the Arbitrators), on the 12th of *September*, 1865, made some written observations founded upon the written opinions of Mr. *Punnett* and Mr. *Bates*, the two Arbitrators.

On the 22nd of *September*, 1865, the Civil Court ordered the submission to arbitration to be filed under the provisions of 326th section of Civil Procedure Code of *India*.

The Appellant insists, that this was wrong, and that the decision of the Court below ought to be reversed, and that the submission to arbitration could not properly have been filed under the section 326 of the Civil Procedure Code, as no agreement to file it had been made, contending that it was open to him to revoke the submission to arbitration at any time.

On the 22nd of *September*, the day on which this decision was pronounced, Mr. *Schlunk* was appointed Umpire by the Arbitrators, by writing signed by them at the foot of the submission to arbitration. This appointment was confirmed by the Civil Court on the 6th of *October*, 1868, and, on the 17th of the same month Mr. *Schlunk* made his final award


in favour of the Respondents. The Order of the Civil Judge, of the 22nd of *September*, was appealed from and confirmed by the Order of the High Court of Judicature on the 15th of *January*, 1866. The Appellant then presented a petition to set aside the Award on the ground of irregularity and misconduct, which was dismissed as being too late; and the final Award of Mr. *Schlunk* was confirmed and carried into execution by the Decree of the Civil Judge on the 9th of *October*, 1866. The Appellant petitioned for leave to appeal from the decision, which petition was dismissed by an Order of the High Court on the 7th of *January*, 1867. On the same day, the High Court of Judicature at *Madras*, affirmed the decision of the Civil Judge of the 6th of *October*, 1865, confirming the appointment of Mr. *Schlunk* as Umpire. The present appeal is brought from all these three decisions of the High Court of Judicature.

The first question is, whether the Civil Court of *Calicut* had jurisdiction under section 326 of the Code of Civil Procedure in *India*, to direct the submission to arbitration to be filed. Their Lordships are of opinion, that upon a proper construction of the sections of that Code relating to this subject, the Civil Court had that jurisdiction. The Code, which is one of procedure, and the Act enacting it, must be construed with reference to the constitution of those Courts, and the abiding direction to them to proceed in all cases, according to equity and good conscience.

The 326th section is to this effect:—[His Lordship read it, see *ante*, p. 113, and proceeded].

Although this section is not expressly referred to in the submission to arbitration, still their Lordships

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are of opinion, that the submission to arbitration was under and subject to the sections contained in the Code relative to this subject. Their Lordships are of opinion, that this submission to arbitration was entered into subject to the provisions of this Code, and that the Memorandum at the foot thereof is introduced for that purpose, and that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them, that it was to be subject to the Act, and that this special notice of section 327, as to the enforcement of the decision of the Arbitrators, was introduced only *ex majori cautela* for the purpose of expressing what, without such expression, would nevertheless have been implied.

Their Lordships are of opinion, that according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to such an agreement can revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority is not permitted.

Their Lordships do not think it necessary to refer to the English law on this subject further than to point out, that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration; and to put such agreement for arbitration

on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract.

Their Lordships are, therefore, of opinion, that it was not in the power of the Appellant simply, at his own mere will and pleasure, to revoke the authority of the Arbitrators in whose appointment he had concurred.

It remains to be considered, whether the circumstances of this case justified the Appellant in doing so, and sending the Letter of the 5th of *August*, 1865.

This is founded solely on the delay.

On the 24th of *July*, 1865, the Appellant wrote to the Arbitrators, and required that in ten days from that date they should make their Award, or in the event of not doing so, should nominate and appoint an Umpire, and this not having been done after waiting for ten clear days, he sent the notice of the 5th of *August*, 1865. If nothing whatever had occurred since the appointment of the Arbitrators in *June*, 1864, and all matters between the Appellant and the Respondents had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think, that this delay of the Arbitrators would have justified the course which the Appellant adopted. But in truth the facts disclose a very different course of proceeding. In *July*, 1864, the Arbitrators made their Award in a very important part of the matter in difference. They dissolved the part-

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nership, and delivered up the business to the Appellant, who has, since that time, carried it on alone, and had done so for a year prior to the Letter of the 24th of *July*, 1865.

A second decision of the Arbitrators relative to the *Ponany* farms was made in *May*, 1865, and acquiesced in by both parties, the Appellant and the Respondents.

A notice to the Arbitrators to make their award and to appoint an Umpire in ten days, does not appear to their Lordships to be sufficient time given to entitle the Appellant to stop all further proceedings, and to cancel all further proceedings.

It is to be observed, that a most important part of the matters referred, namely, the determination of the person who was to have the business in future, had already and speedily been determined. After the two decisions of the Arbitrators there appears to have been little that remained to be done, except to determine matters of account between the parties. What the intricacy or difficulty of settling them was does not appear, and on a question of time this is a matter of importance. It might well be, that the time occupied for that purpose was not excessive. On this point, even if it could be availing, their Lordships have no evidence. It might also well be, that ten days might be usefully and properly employed by the Arbitrators in an endeavour to remove the points of disagreement between them, and only when this was found to be impossible, that it would become necessary to refer the matter to an Umpire. On the 6th of *July*, 1865, Mr. *Punnett* stated his views in a long written opinion. Mr. *Bates* also stated his in a similar docu-

ment on the 5th of *August* in that year. This was answered by Mr. *Punnett* on the 25th of *August*, and on the 7th of *September*, Mr. *Bates* replied. Before this Mr. *Schlunk* had been selected, though not appointed, to act as Umpire, his appointment having been delayed, as it seems, in consequence of the civil proceedings instituted in the Civil Court on the 23rd of *August*, 1865.

Mr. *Schlunk* took and considered the expressed opinion of the two Arbitrators, and made observation thereon on the 12th of *September*, 1865. The decision of the Civil Court asserting the jurisdiction of the Civil Procedure Code over this matter was pronounced on the 22nd of *September*, 1865. On the same day, Mr. *Schlunk* was appointed Umpire, and he made his Award between the parties on the 17th of *October* following. No error is pointed out in the Award itself; a complaint is made, that Mr. *Schlunk* did not open up the whole matter from the beginning. It is said that he appointed no meeting, that he heard no Counsel, that he took no evidence; their Lordships are of opinion, that it was not necessary for him to do so. The parties had agreed to the arbitration of Mr. *Punnett* and Mr. *Bates*, subject to the decision of an Umpire on the points where they differed. They agreed on some important points; they expressed their decision in the first Award of the 15th of *July*, 1864, and in the second Award of the 13th of *May*, 1865. They differed as to other points. They expressed this difference in writing, and they appointed Mr. *Schlunk* to be the Umpire to decide these points between them. This he did after, as it appears, weighing and considering the facts and arguments adduced

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by both the Arbitrators in the documents laid before him.

Their Lordships are of opinion, that the course so adopted was correct, and that the Courts below have acted rightly in upholding the decision of the Umpire. Their Lordships do not mean to lay down, that in cases of this description, where no time is originally fixed within which the Award was to be made, it would not be open to either party to hasten the proceedings by giving notice to the Arbitrators, that the Award must be made, and an Umpire appointed within a reasonable time. But it is to be observed, that here the time which elapsed from the period when the Appellant gave the notice of the 24th of *July*, 1865, was actively employed. It was obviously of no use to appoint an Umpire until the points on which the Arbitrators differed were clearly defined. This was done by four papers:—First, the opinion of Mr. *Punnett*; second, the opinion of Mr. *Bates*, delivered on the same day that the notice to cancel the submission were given; third, the further opinion of Mr. *Punnett*, on the 25th of *August*, 1865; and fourth, the final opinion of Mr. *Bates*, on the 7th of *September*, 1865, and these were adjudicated upon by Mr. *Schlunk*, the Umpire, in his Award made on the 17th of *October*, 1865, but delayed apparently by reason of the civil proceedings and the necessity of obtaining the sanction of the Court to the confirmation of the Order appointing him Umpire.

If the object of the Appellant was to accelerate the proceedings by his notice of the 24th of *July*, 1865, he certainly succeeded in doing so; but their Lordships are of opinion, that he cannot recede from the

submission by reason of that notice, followed by the notice of the 5th of *August*, 1865, when, in fact, he has for above a year enjoyed the fruits of the Award on various points, and when it is impossible to restore the parties to the position they were in, if all the acts of the Arbitrators were to be considered null and void.

On the whole, therefore, their Lordships, without thinking it necessary to relate in detail the proceedings in the Courts in *India*, approve of the decisions there pronounced, viz., the Order of the 22nd of *September*, 1865, of the Civil Court, directing the submission to be filed; the Order of the Civil Judge of the 6th of *October*, 1865, confirming the appointment of the Umpire; the Order of the High Court of the 15th of *January*, 1866, dismissing the appeal of the present Appellant from these Orders; and the final decree of the Civil Judge of the 8th of *February*, 1866, confirming the Award of Mr. *Schlunk*, and directing the same to be carried into execution; and also the Order of the High Court of Judicature of *Madras* of the 7th of *January*, 1867, dismissing the petition of the Appellant: and consequently they will humbly recommend to Her Majesty, that this appeal be dismissed, with costs.

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SREE ECKOWRIE SING AND OTHERS ... *Appellants* ;

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HEERALOLL SEAL AND OTHERS ... *Respondents*.*

*On appeal from the High Court of Judicature at
Bengal.*

7th, 8th & 9th
Dec., 1868.

Ejectment
to recover
land as allu-
vial.

Land washed
away and re-
formed in the
bed of a tidal
river, the
ownership of
which was
not proved to
be in the ri-
parian pro-
prietors of its
banks (the
predecessors
in title to the
Plaintiffs and
Defendants).
Held :—that
the forming
of a *chur* in
such a stream,
after a con-
siderable in-

THE question involved in this appeal was the right to a large tract of alluvial land formed in the river *Roop-narain* in the *Zillah* of *Midnapore*, containing in area 1,000 *beegahs*, under cultivation, which was claimed by the Appellants as parcel of certain *Mouzahs* belonging to them. The land had been, for a long time previous to the suit being brought, in the possession of the Respondents.

The land in dispute, sometimes called a *chur* (alluvial) land, and described also as *sheekustee-pur-wastee*, or land carried away by the river and re-formed as alluvial land, was alleged by the Appellants as having been formerly part of their *Mouzahs*

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore.

Assessor :—The Right Hon. Sir Lawrence Peel.

terval and frequent floods, is not *prima facie* to be ascribed to a loss from any particular portion of the adjacent lands of the riparian proprietors, nor is the land forming such *chur*, which had been removed by a sudden avulsion reclaimable, unless there is evidence of identity.

A detached *chur*, independent of usage, in such a river, belongs to neither riparian proprietor ; and the fact that it was subtended by the land of one is not *per se* enough to entitle him to it.

The title by accretion to a new formation of alluvion land is not generally founded on equity of compensation, but on a gradual accretion by adherence to some particular land. The land so gained follows the title of that to which it adheres.

which had been washed away by the river, and formed the *chur* which adjoined the *Mouzahs* of the Respondents, who claimed such land as part of their *Mouzahs*.

The suit was instituted in the *Zillah* Court of *Midnapore*, and was in the nature of an action of ejectment brought by the Appellants as *Putnee Talookdars* against the Respondents, and one *Rampersaud Jana*, described as *Durputnee Talookdar*, or under-tenant of their deceased Father, to recover the land described in the plaint as alluvial, the boundaries of which were set forth in a map annexed to the plaint, as having been washed away from their *Mouzahs*, which it was insisted by them in the plaint was to be considered as an increment thereto under *Ben. Reg. XI. of 1825*.

The *Zillah* Judge, in the first instance, referred it to an *Ameen*, to make a local investigation, who, having made an inspection on the spot, and examined witnesses in the presence of both parties, and made a plan of the locality, reported in favour of the Appellants' claim.

Upon this report, and after taking evidence, the Principal *Sudder Ameen* of *Zillah Midnapore* (Mr. *A. Davidson*) made his decree, dated the 30th of *August*, 1861, whereby he held, that under cl. 1, sec. 4, of *Ben. Reg. XI. of 1825*, the Plaintiffs were entitled to the *chur* in dispute, with the exception of a portion, which adjoined the Defendants' land, and decreed possession, with mesne profits.

The Defendants appealed therefrom to the High Court at *Calcutta* on two specific grounds, first, that the Plaintiffs had produced no reliable evidence, that in the year 1239 B.E., or previous to that date, the

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Plaintiffs, or their representatives, were, as they alleged, in possession of the disputed alluvial land; and, secondly, that they had failed to prove, that the *Mouzahs* named by them existed previous to 1239, B.E., on the site in dispute.

The High Court, consisting of Messrs. *H. V. Bayley* and *E. Jackson*, by their decree, dated the 8th of *December*, 1863, were of opinion, that the Plaintiffs had not sufficiently or satisfactorily proved their case, and on that ground reversed the judgment of the Principal *Sudder Ameen*. Hence this appeal.

Mr. *Field*, Q.C., and Mr. *Pontifex*, for the Appellants; and

Sir *R. Palmer*, Q.C., and Mr., *Leith*, for the Respondents, *Heeraloll Seal*, *Chooneeloll Seal*, and *Punnallol Seal*.

On the part of the Appellants it was contended, that the evidence established, that the *Mouzahs* in respect of which they claimed the alluvial land in question, belonged to them, having been granted to their ancestors as *Putneedars* in the year 1811. That in the year 1831-32, the land, part of their *Mouzahs*, became submerged by the tidal river *Roopnarain*, and continued so submerged until about the year 1842, when it began to re-form into a *chur*. That in the year 1848 it became capable of cultivation; that at that time the Appellants were infants, incapable of protecting their rights; and that being owners of the *Mouzahs* to which these alluvial lands became attached by accretion, they were entitled to the same under *Ben. Reg. XI. of 1825, sec. 4, cl. 1.*

On the other hand, the Respondents submitted,

first, that the *onus* of proving the Appellants' title to the alluvial land, and their right to oust the Respondents, who were purchasers for value without notice of the Appellants' claim, lay on the Appellants, and put them on strict proof of title, and that they had failed to give any reliable evidence of identity of the land in support of their title to the *chur*; secondly, that the land ought, after its long undisturbed possession, to be presumed to belong to the Respondents; and, lastly, that they had shown by their evidence, that the alluvial land was an increment to their *Mouzahs*, and consequently they were entitled to the same under the provisions of *Ben. Reg. XI. of 1825, sec. 4, cl. 1.*

Judgment was reserved, and now delivered by

The Right Hon. LORD CHELMSFORD.

This suit is brought to recover about 1,000 *beegahs* of land, claimed as alluvial, and contained within the boundaries given in a map annexed to the plaint. The Plaintiffs must succeed or fail on their title to the land as alluvial. It is not competent for them now, the cause having been decided on this title, to raise at the hearing of their appeal a different case, viz., one simply of original ownership of the site of the lands re-formed. Had that been the case alleged, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual, of the original loss of land, and the effect of change from such causes in the land itself on the ownership in the soil; which defence, as is apparent from the frame of *Ben. Reg. XI. of 1825*, would admit of variation with varying circumstances of inundations, identification, and

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accretion. The cause was tried before the Principal *Sudder Ameen*, who decided in the Plaintiffs' favour. On appeal to the High Court, that decision was reversed, and from that decree of reversal the present appeal has been preferred. The High Court simply decided, that the proofs adduced by the Plaintiffs were insufficient to justify a decree in their favour.

Had this been a case of ordinary claim to lands, wherein a Plaintiff might advance, prove, and recover on a *primâ facie* title, calling for some answer of title in a Defendant, and entitling him to a decree in default of such an answer being made and proved, the propriety of the decision of the High Court might have been assailed with more prospect of success. But this is a case of a claim to land washed away and re-formed in the bed of a navigable river, the ownership of the soil of which is not commonly in the riparian proprietors of its banks, and which is not proved in this case to have belonged to the predecessor in title of either disputant. The re-forming of land in such a stream, after a considerable interval and frequent floods, is not *primâ facie* to be ascribed to a loss from any particular portion of territory, nor is the land which has been removed by a sudden avulsion reclaimable unless the circumstances supply evidence of identity, which is wanting in the case before us. This re-formed land is not ascribed to avulsion, and several years elapsed between the loss of the Plaintiffs' land and the appearance of this *chur*. The title by accretion to a new formation generally, is not founded on equity of compensation, but on a gradual accretion by adherence to some particular land which may be termed the nucleus of accretion. The land gained will then follow the title

to that parcel to which it adheres. It is obvious, therefore, that such a title is not established by mere proof of general inclusive boundaries of land, at a time long preceding the actual formation of the *chur*, since the lands that have such a fluctuating boundary as a tidal river, and which are themselves subject to loss and gain of quantity by acts independent of the owners' concurrence, and which may pass from side to side of the river boundary, have not the ordinary element of fixedness which belongs to immovable estate, in the common course of things. A detached *chur*, independent of usage, in such a stream would belong to neither riparian proprietor; and the circumstance that it was subtended by the land of one would not be enough to entitle him to it. The decision of this case in the Court below seems to have proceeded on the mere presumptions which would have regulated the decision of a question of parcel or no parcel in an ordinary boundary dispute; for no evidence whatever was given by the Plaintiffs of the nature of the original formation of the *chur*, where it first appeared, to what it first adhered, and the case even now affords no ground for concluding anything with reasonable certainty, as to the original title to it.

The Defendants, it was conceded by their able Counsel, might be unable to sustain a title to the *chur*, as Plaintiffs; but it was urged with force and reason, that by reason of their long enjoyment and being innocent purchasers for value, they were entitled to put every Claimant to strict proof of title. They are purchasers for value without notice of any prior or superior claim. Acquisitions of the nature of this *chur* are often doubtful in their origin; they must depend much on oral testimony, which time is

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constantly destroying or impairing and it is often hard to say who is the person to whom the law would ascribe the legal ownership of them. The mere cultivation of them, like that of waste or jungle lands, carries with it no *primâ facie* character of usurpation or wrong. An undisputed possession and cultivation, even though for a few years only, would the more readily induce a purchase, and a purchaser *bonâ fide* and without notice might with perfect honesty, and even with the favourable construction by a Court of Justice of his acts, defend his possession by insisting on strict legal proof of an adverse title.

The High Court appears to have acted upon this principle, though the Judges have ascribed too long a possession to the Defendants, and may have erred in their view of portion of the evidence. The grounds of their decisions seem to their Lordships correct; the *ratio decidendi* is not a mistaken one, though it is supported in part by mistaken reasons. They have acted, in requiring adequate documentary proof in a conflict of oral proof, in accordance with the course adopted by the Judicial Committee itself on this point, in a somewhat similar case, *Mussumat Imam Bandi v. Hurgovind Ghose* (4 Moore's Ind. App. Cases, p. 403). They were dissatisfied with the documentary proof exhibited; they have said, that better might have been brought forward had the case of the Plaintiffs been well founded. Their Lordships are not prepared to dissent from either expression of opinion. To admit documents, not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the *chittahs* which

have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in documents not legally admissible in proof against them. The document put in evidence and relied on by the Appellants appears to be only a copy of a *chittah* of resumed land, and it is introduced by no evidence preparing the way for its reception. Whatever might be the value of the *chittahs* in general in questions between the *Zemindar* and his tenants or *Ryots*, to receive them as evidence of boundary, against a rival proprietor, without further account, introduction, or verification, would, if it obtained as a practice,—and each relaxation is apt to become a precedent for another,—tend further to encourage the manufacture of evidence in a place already too prone to the fabrication of it. Their Lordships, therefore, are unable to ascribe any error to the way in which the High Court has dealt with the documentary evidence in this cause.

It has not unfrequently happened, that their Lordships, in a conflict of decisions on questions of fact between the Judge who heard the evidence and the Court which reviewed it, have followed the finding of him who saw the witnesses and heard them give their evidence; but in this case the Judge below appears not to have sufficiently regarded the nature of the claim and the proof it should receive. He appears further to have acted mainly on the report of the *Ameen*, and that report, like the judgment which was founded upon it, appears to their Lordships to proceed upon a mistaken view of the issue between

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the parties and of the burthen of proof which the Plaintiffs in this suit had to support. The conclusions of both are founded more upon the want of proof to support the title alleged by the Defendants than upon proof of that title which it was necessary for the Plaintiffs to establish in order to disturb the possession of the Defendants.

The map of the *Ameen* itself shows, that there were lands of other owners than the Plaintiffs so situated; that they might have been, in the course of things, a nucleus to the increment, and, therefore, an inquiry into its origin and direction was one that ought not to have been neglected. The case itself is one turning on views of evidence on which their Lordships would be reluctant to differ from the opinion of a Court more likely to know than their Lordships can be, what weight of proof would satisfy there the just expectations of a Court of Justice.

Their Lordships, therefore, agreeing with the High Court in their disregard of the *chittahs*, and with their conclusion that the case was not sufficiently proved, will humbly recommend to Her Majesty, that the appeal be dismissed with costs.

RAJAH BURDACANT ROY ... *Appellant* ;

AND

BABOO CHUNDER COOMAR ROY AND }
OTHERS ... } *Respondents.**

*On appeal from the High Court of Judicature
at Bengal.*

THE question in this appeal was one of boundaries. The object of the suit being to recover possession of 1,125 *beegahs* of land, with mesne profits, and, as subsidiary thereto, to set aside an Order of the Judge of the Sessions Court of *Zillah Jessore*, made under Act, No. IV. of 1840, and also a miscellaneous Order of the Magistrate of that *Zillah* under which possession of the lands in dispute had been given to the Appellant.

The facts of the case were as follows :—

The *zemindary* of *Pergunnah Dattea*, or *Hosseinpore*, was in the year 1828–9 the joint *zemindary* of *Nilcomul Paul Chowdhry* and *Bungseedhur Paul Chow-*

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore.

Assessor :—The Right Hon. Sir Lawrence Peel.

new suit being brought by the Plaintiff upon a different issue.

In a case of disputed boundaries, where one of the Claimants is in possession by virtue of a Magistrate's Order, under Act, No. IV. of 1840, it lies on the party seeking to oust him, to show a better title to the land claimed than that of the party in possession.

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As a rule, the Judicial Committee will not disturb the concurrent judgments of the Courts below on a question of facts, if the facts as found, are decisive of the real issue between the parties.

In circumstances, from the frame of the issue upon a question of title to land, decrees of the Court below, reversed, without prejudice to a

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dhry, from whom it descended to one *Joychunder Paul Chowdhry*, and was subsequently sold under a decree of the late Supreme Court at *Calcutta*, and purchased by the Respondent.

Within the *zemindary* is the *mouzah* of *Jhanpa*, and to the north of the lands of the village lie the lands of the village of *Mullickpore*, part of the Appellant's *zemindary* of *Syedpore*. The boundary line of the villages is a high *ganthee* (bank), which forms the northern bank or dyke of the *Bawoor* (lake) of *Jhanpa* aforesaid, which, as it appeared, joins three sides of the village, and which on the northern side had gradually silted up, and formed *joallee* (marsh land favourable for growing rice). Connected with and on the *Jhanpa* side of the *Bawoor*, and running parallel with it, is the bed of an old canal, also partially filled up, called the *Jhennoedoha*. The land which lay between the *Jhennoedoha* and the *ganthee* called the *jolibila* of *Jhanpa*, had, as alleged by the first and principal Respondent, been the property of the successive *Zemindars* of the village of *Jhanpa* from time immemorial, and had been gradually taken up into cultivation by the inhabitants of that village.

On the 24th of *January*, 1829, one *Bunomalee Ghose*, an inhabitant of *Solekhada*, within the *zemindary* of *Syedpoor*, presented a petition to the Collector of the *Zillah Jessore*, in which he alleged, that a former *Zemindar* of *Pergunnah Dattea* had granted to an ancestor of the Petitioner the jungle and waste of the *jolibila* of *mouzah Jhanpa*, which was cultivated by him; that the land afterwards fell back into jungle, and was inundated, and consequently was not included in the estimate of *la-*

khiraj land ; that the *jolibila* was at the date of the petition cultivated by the *Ryots* of *Nilcomul Paul Chowdhry*, and *Bungseedhur Paul Chowdhry* and others, at that time the *Zemindars* of *mouzah Jhanpa* ; that when a *Lakhirajdar* failed to make an estimate of his *lakhiraj* land, the land became liable to assessment by the Government, and the Petitioner prayed that the land might be resumed by the Government and leased to him.

The last-mentioned *Zemindars* filed a petition of objection, in which they stated, that the land in dispute was their rent-paying land, and not *lakhiraj*, and that the allegations in the petition that the land was *lakhiraj* were false.

In consequence of this petition, a suit was instituted by the Government, on the 23rd of *April*, 1829, against the *Zemindars* before the Collector of *Zillah Jessore*, under *Ben. Reg. II.* of 1819, in which the Government claimed a right to resume the land as *lakhiraj* land, not estimated as such in the return made by the *Lakhirajdars*. The Defendants, by their answer, stated that the land in dispute formed a part of *mouzah Jhanpa*, appertaining to their *zemindary*, and that the *malguzary* of the same was paid with the revenue of their other land in the *zemindary*.

Various proceedings in this suit took place, and on the 22nd of *April*, 1835, the Collector made an Order, that the land be released from the claim of the Government, and the suit be dismissed.

It appeared that in *March*, 1834, criminal proceedings had been instituted before the Magistrate of the *Zillah Jessore* by *Ryots* of the Appellant against one *Ramcoomar Sircar*, *Gantheedar* of *Nilcomul Paul*

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Chowdhry, charging him with having cut and carried away *paddy* from land situate in the *jolibila*, on the allegation, that the land appertained to the *zemindary* of the Appellant, and that they held it at a *jumma*; whilst *Ramcoomar Sircar* stated, that it belonged to the *zemindary* of *Nilcomul Paul Chowdhry*. The Magistrate considering, that the dispute between the parties related to the right to the land, ordered *Ramcoomar Sircar* to be released, and that a suit should be instituted in accordance with *Ben. Reg. XV.* of 1824. A suit was accordingly instituted in the *Fouzdary* Court, on behalf of the Appellant, against *Nilcomul Paul Chowdhry* and others, which was afterwards struck off the file of the Court in consequence of the failure of the Plaintiff to proceed with the same.

Subsequently the *zemindary*, including the *mouzah Jhanpa*, came into the possession of *Joychunder Paul Chowdhry* as *Zemindar*. The Appellant then instituted, on the 12th of *December*, 1851, a suit under Act, No. IV. of 1840, before the Magistrate of *Zillah Jessore*, claiming from 600 to 700 *beegahs* of the *jolibila*, alleging it to appertain to his *zemindary* of *Syedpoor*, and specifying certain boundaries. This suit was brought against *Ramcoomar Sircar*, as Defendant.

The case came on for hearing before Mr. *F. N. Beaufort*, the Magistrate of the *Zillah*, on the 22nd of *December*, 1851, when he dismissed the Plaintiff's claim, and directed that if any person should thereafter make a claim by a separate suit, the same should be tried in accordance with sec. 2 of Act, No. IV. of 1840. In his judgment he said, "As the Court had four or five times proceeded to the

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land in dispute, and had inspected and seen that the shore on the north of the *Bawoor* was high ; whereas the land to the south had gradually lessened in height, and was being absorbed, and, under these circumstances, nothing appears to show the disputed land had come into the possession of the Plaintiff's tenants at *Mullickpore*, and at the present time it is necessary only to inquire as to who was in possession, and not to try the question of right, and nothing has been proved by the documents filed and the witnesses produced by the Plaintiff, to show that the Plaintiff was in possession ; consequently it is not necessary to give the Plaintiff any time to produce other documents."

The Appellant appealed therefrom to the Judge of the Sessions Court of the *Zillah*, Mr. *R. M. Skinner*, who set aside the last-mentioned Order, and remanded the case for a re-hearing.

The case was re-heard before Mr. *C. S. Belli*, the then Magistrate of the *Zillah*, when the suit was dismissed. The Appellant appealed against the same in the Sessions Court, and *Ramcoomar Sircar* instituted a cross appeal.

The two appeals came on for hearing before the Sessions Judge, Mr. *R. M. Skinner*, on the 16th of *August*, 1852, when he reversed the above decision of the Magistrate, and dismissed the appeal of *Ramcoomar Sircar*, on the ground that the *Bawoor Jhanpa* was within the *zemindary Syedpoor*, then in the possession of the Appellant, and that his possession should be upheld.

Under an Order made thereon the Appellant took possession of 700 *beegahs*, or thereabouts, of the land so decreed to him, and subsequently one

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Kaledoss Dhur, and *Shamasoonderee Dossia* instituted a suit against the Appellant, alleging, that the Husband of *Shamasoonderee Dossia* had received a *pottah* from him in the year 1844; and that on the 23rd of *May* 1856, they had obtained a decree in their favour in respect of 200 *beegahs* of the last-mentioned quantity of land, and that the Appellant thereafter held possession of the same through them as his alleged tenants. *Gobindchunder Sircar*, the Son of *Ramcoomar Sircar*, *Gantheedar*, and others, had formerly held possession of the land, of which the Appellant obtained possession as aforesaid, and they were in possession of 425 *beegahs* of land adjoining the same, under a lease from the Respondent, according to certain described boundaries. *Kaleedoss Dhur*, and *Shamasoonderee Dossia*, after obtaining possession of the 200 *beegahs* of land, attempted to cut and carry away the crops from a portion of the 425 *beegahs*, and a petition was accordingly presented to the Deputy Magistrate of the *Zillah*, by *Gobindchunder Sircar*, the prayer of which was, that the boundaries of the villages of *Jhanpa* and *Mullickpore* might be adjusted according to one measurement to be made by the *Thackbust* (survey) department. An Order was thereupon issued to the *Darogah* of the *Singha Thannah* adjacent to *Jhanpa*, directing him to mark out the boundaries according to certain instructions contained in the Order. In accordance with the report of the *Darogah*, the aforesaid *Jhennoedoha* was fixed by the Magistrate as the boundary of the two villages, and the 425 *beegahs* were severed from the *zemindary* of the Respondent, and added to that of the Appellant. This Order was, on the 12th of *September*, 1857,

confirmed on appeal by the Judge of the Sessions Court of the *Zillah*.

In consequence, the Respondent, *Baboo Chunder Coomar Roy*, who had purchased the *zemindary* on the 13th of *May*, 1856, brought a regular suit on the 23rd of *September*, 1858, in the Civil Court of *Zillah Jessore*, against the Appellant and others his tenants, to recover possession of 1,125 *beegahs* of land, with the *wasilat* of the same, estimated at Rs. 9,000, and for a decree to reverse the several Orders of the Magistrates before mentioned. The plaint, after setting forth the principal facts before stated, alleged that, with respect to the boundaries, the land appertained to the *mouzah Jhanpa*, situate within, and belonging to, the *zemindary* of the Respondent, and had always been in the possession of the former proprietors of the *zemindary*; that it was not a part of the *mouzah Mullickpore* in the *zemindary* of the Appellant, and prayed that the Court would set aside the Orders above mentioned, and would give possession to the Respondent of the disputed land in accordance with certain boundaries therein specified, and the plaint set forth the mesne profits and interest from the date of the purchase made by the Respondent of the *zemindary*.

A separate answer was put in by the Appellant, the principal Defendant, in which pleas in bar were pleaded, to the effect, first, that the Son and heir of the *Gantheedar, Ramcoomar Sircar*, then deceased, with others, should have been joined as Plaintiffs in the suit; secondly, that the plaint was defective under sec. III. *Ben. Reg. IV.* of 1793, by reason of the mode of calculation of mesne profits as stated in the plaint, being unexplained; and, thirdly, that the suit

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was barred by sec. XIV. of *Ben. Reg. III.* of 1793. The answer then alleged facts contradictory of the statements made by the Respondent in the plaint, that the lands and the *Bawoor Joalee* on both sides of the *Bawoor*, the lands in front of the *Bawoor*, and the *Bawoor* itself were all included in the *mouzah* of *Mullickpore*, within the *zemindary* of the Appellant. The other Defendants put in answers supporting the Appellant's case.

In compliance with sec. X. *Ben. Reg. XXVI.* of 1814, the following issues were recorded, first, whether the land belonged to Plaintiff's *zemindary*, and was held by him through his *Ryots*, till he was dispossessed by the Order under Act, No. IV. of 1840, or whether it belonged to the Defendant's *Zemindary* of *Syedpore*; and secondly, whether the Plaintiff was entitled to the restitution of the land in reversal of the Orders of the Magistrates and survey authorities.

Evidence was gone into at great length on both sides.

The hearing of the suit took place on the 3rd of *September*, 1860, before Mr. *S. C. Belli*, the Judge of the Civil Court of *Zillah Jessore*, who, by his judgment of that date, decided, that the Respondent was entitled to recover possession of the land up to the ridge or bank on the north side of the *Bheel* and according to certain other boundaries described by him, and it was directed that an *Ameen* should be appointed to mark and fix the boundaries.

The Appellant appealed from this judgment to the High Court of Judicature.

The hearing of the appeal took place on the 23rd of *April*, 1863, before Messrs. *H. V. Bayley*,

and *G. Campbell*, two of the Judges of the High Court, when they affirmed the judgment of the Lower Court, and dismissed the appeal with costs.

The appeal was from this decree of affirmance.

The principal question raised by the appeal was, whether the land appertained to *mouzah Jhanpa*, a village situated within the *zemindary* of the Respondent, as an accretion to the lands of that village, by the gradual dereliction of the water of the *Bheel* or lake *Jhanpa*, or whether, as contended by the Appellant, the lands appertained to *mouzah Mullickpore*, part of his *zemindary* of *Syedpore*, on the further side of the lake.

Mr. *Forsyth*, Q. C., and Mr. *Pontifex*, for the Appellant, and

Mr. *Leith*, for the Respondent, *Baboo Chunder Coomar Roy*.

Their Lordships' judgment was delivered by

The Right Hon. Lord CHELMSFORD.

Their Lordships would not have departed from their usual course of not disturbing the concurrent judgments of the Courts below on a question of fact, if the facts as found were in truth decisive of the real issue between the parties.

That issue is, whether the lands in dispute belong to the *zemindary* of the Appellant, or to the *zemindary* of the Respondents.

The Appellant is in possession under a Magistrate's Order; and it, therefore, lay upon the principal

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Respondent, who was the Plaintiff in the suit, to oust him from that possession by showing a better title to the property claimed. It is an admitted fact, that at the date of the perpetual Settlement both estates were settled for with the Defendants' ancestor either as one *zemindary* or as two separate revenue-paying estates. It is also clear, that the *Bheel* from which these lands have been gained was part of the *zemindary*. The resumption suit proves that no right to re-assess lands which might be gained from the *Bheel* remained in the Government.

In 1796 the two properties were severed by means, as it is said, of a sale for arrears of revenue, and *Pergunnah Dattea*, which includes the village of *Jhanpa*, was acquired by the *Paul Chowdhrys*, through whom the Plaintiff claims.

It is also an admitted fact, that the *Fulkur* and every right which could be exercised by the *Zemindar* while the land was covered with water (what the Judge calls the "aqueous assets") remained in the Appellant or those whom he represents. In these circumstances, it lay upon the Respondents to show that the effect of the revenue sale was to transfer to them, as part of the village of *Jhanpa*, any soil which might be recovered from the *Bheel*. It has been argued at the Bar, that this alleged title of the Respondents must be inferred from the conformation of the ground or the name of the village. But if any presumption, however slight, can be drawn from these circumstances, they seem to their Lordships to be more than rebutted by the admitted fact, that after the sale the *Fulkur* of the *Bheel* remained in the Appellant's ancestor. It has been argued, that

the right in the *Fulkur* may be distinct from the right in the soil, and this no doubt is true. But here both had been admittedly in the Appellant's ancestor, and it lay upon the Respondents to show when and how they were severed.

The facts found by the two Courts below bear only upon the latter part of the first issue, settled in the cause, viz., whether the Plaintiff was in possession of the lands through their tenants, and had been ousted by the Order in the suit under Act, No. IV. of 1840. That finding does not touch the material part of the issue, viz., whether the land in dispute appertains to the Plaintiffs' *mouzah Jhanpa*. Even if it were proved, that some *jolibila* land was annexed to the village, and passed as part of it at the time of the sale, it does not follow that the land which has since been recovered from the *Bheel* (and great part of the land in question has been admitted to have been so reclaimed since the date of the sale) would so pass. Yet the argument at the Bar went the full length of contending, that the whole site of the *Bheel*, if cleared of water and made capable of cultivation, would fall into and become part of the Respondents' village, *Jhanpa*, though whilst it was covered with water it remained under the dominion of the Appellant. For such a contention their Lordships can see no ground. The decision of the *Fouzdary* Courts, as to the point of possession, was final. The question in this suit was, whether the Plaintiff, by showing a better title than the Defendants, could recover possession from them. In their Lordships' judgment the original title to this land was in the Appellant's ancestors, and it has not been shown that

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they ever lost it. It is possible, though not very probable, that if there had been fuller evidence of the original Settlement of these properties, and of what passed by the revenue sale, this might have been done. Their Lordships, therefore, in the peculiar circumstances of this case, though they think that the appeal ought to be allowed and the present suit dismissed with costs, and will make their humble recommendation to Her Majesty accordingly, will also recommend, that Her Majesty's Order be made without prejudice to the right of the Respondents to bring, if they shall be so advised, a new suit for the recovery of the lands in question, upon the ground that the title to these lands passed to the *Paul Chowdhrys*, from whom the Respondents derive their title by the revenue sale.

SHAH MUKHUN LALL, AND OTHERS *Appellants*;

AND

BABOO SREE KISHEN SINGH, AND } *Respondents.**
OTHERS ...

*On appeal from the Sudder Dewanny Adawlut
at Calcutta.*

THERE were two appeals in this case, brought from a decree of the late *Sudder Dewanny Adawlut* at *Calcutta*, reversing a decree of the Judge of *Zillah Sarun*.

The suit in which these appeals were made was

* Present:—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore

Assessor:—The Right Hon. Sir Lawrence Peel.

10th, 11th, &
12th Dec.,
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Construction
of *Ben. Reg.*
XV. of 1793,
as to usurious
interest.

A Mortgage
Lease, and
Agreement,
held to con-
stitute one
mortgage se-

curity, the three instruments being entered into as a device to avoid the usuary laws within the meaning of section 9 of *Ben. Reg. XV. of 1793*. Held also, that the Mortgagees were entitled to redeem at any time, before the expiration of the term created by the Lease, on payment of what might be due on the mortgage security for principal and interest at twelve *per cent.* and costs.

In a suit by Mortgagees under an usufructory mortgage to establish their right to redeem; for cancellation of the mortgage deed, possession of the lands, and payment of the surplus:—Held, that the *onus* lies on the Plaintiffs to show that the Mortgagees in possession were paid in full by perception of the profits.

Semle: *Ben. Reg. XV. of 1793, sec. II.*; with respect to the non-production of accounts of receipts by Mortgagees in possession, is still in force, and unrepealed by Act, No. XXVIII. of 1855.

In an appeal from the *Sudder Court*, the Appellants, by the leave of that Court, appealed separately to the Queen in Council. On reversal of the *Sudder Court's* decree, it appearing that the two Appellants had a common interest, only one set of costs of appeal were allowed in moieties to the separate Appellants, as upon one appeal.

It is not too late, on an appeal from a final decree, to raise a question as to interest decided in an Interlocutory decree not appealed from.

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thrice brought on appeal before the *Sudder* Court, and twice remanded to the *Zillah* Court for re-trial. The suit related to what had been decided to be a mortgage transaction, which decision had not been appealed from, and as the case upon appeal stood, the Respondents' contention was, that the Appellants, as Mortgagees in possession, had or ought to have realized more than the principal and interest secured by the mortgage. The Appellants denied that they had realized even sufficient to keep down the interest, but they did not file the accounts required by *Ben.* Reg. XV. of 1793, Sec. II. By the decree appealed from, it was decided, that there was sufficient *primâ facie* evidence adduced by the Respondents, the Mortgagors, to show that the loan had been fully liquidated.

The circumstances of the case were as follows:—

On the 18th of *May*, 1837, *Baboo Juggutputtee Singh* and *Baboo Koylas Puttee Singh*, the ancestors and predecessors in title of the Respondents, and who are hereafter referred to as "the Singhs," executed a deed of lease, or *ticca*, nominally to *Roy Ram Kishen Doss*, a *Gomastah* of the ancestors and predecessors in title of the Appellants, the Mortgagees, of thirty-nine *mouzahs* and a sixth share of *Dochurk Kistobummah* in *Zillah Sarun*, for a term of twenty years, at a fixed annual *jumma* of S. Rs. 24,858. 10a., and by the terms of the deed it was specially provided that: "Besides the fixed rents, whatever profits may accrue, the same will be the remuneration of the *Ticcadar*, and we (the *Singhs*) are not, nor will be, entitled to demand anything save the rents." No consideration was expressed by the deed to have been given for the grant of the lease.

On the 5th of *June*, 1837, the *Singhs*, in consideration of the sum of S. Rs. 1,50,000, borrowed by them from the Banking house of the Appellants' predecessors, executed a deed of mortgage for a term of twenty years of the same property as was comprised in the lease to *Roy Ram Kishen Doss*. The mortgage deed stated the revenue payable to Government in respect of the property to be S. Rs. 11,358. 10a.; the interest payable on the principal moneys borrowed was to be at the rate of 12 *annas per cent. per mensem*. The deed then recited a lease to *Roy Ram Kishen Doss* for the term and at the rent aforesaid, and contained the following provisions:—"We (the *Singhs*) have assigned to the Mortgagees the rental of this *ticca* tenure due by the *Ticcadar* for liquidation of interest on the money received on mortgage, and for paying the Government revenue, agreeably to the conditions of the deed of assignment (hereafter stated) on the *Ticcadar*. The money due by the *Ticcadar* as fixed rental of his tenure on account of these *mouzahs* mortgaged, is Rs. 24,858. 10a. Having annually realized the said amount from the *Ticcadar*, agreeably to the deed of assignment executed by us, you (the Mortgagors) will, therefore, discharge Rs. 11,358. 10a., the public dues, and credit the balance, Rs. 13,500, to the liquidation of the interest on the mortgage debt. And it is competent to the Mortgagees, after the expiry of the term of the *ticca* lease, to settle the said *mouzahs* either with that very *Ticcadar*, or with any other person, or to reduce the same under their own possession, and dispose of the lands by any kind of settlement, such as *bhaolee* (where crops are shared between Landlord and Tenant), or *nukdee* (where the rents are paid in cash). If by

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such settlement and disposal of the lands, anything more than the amount for which we (the *Singhs*) had settled the lands be obtained, we or our heirs have no claim, and will not claim anything beyond carrying to credits the fixed rental of the *Ticcadar*. If We claim excess profits on account of the said mortgaged lands, then, agreeably to this very deed, such a claim shall be deemed false in Civil or Criminal Courts. We further agree, that within the term of this deed of mortgage we will not redeem the property, or cancel the deed of mortgage. At the expiry of the term of the mortgage deed, we having paid up in one sum the whole of the mortgaged debt at the end of the year, whatever year that may be, together with any arrears of rents on account of the lands; shall redeem the mortgage, and having removed the names of the Mortgagees from the register of the Collector, will take back the property."

On the 6th of *June*, 1837, *kutkina* or sub-leases of the property comprised in the lease and mortgage were granted by *Roy Ram Kishen Doss* to under-lessees, and under such sub-leases an aggregate *jumma* of Rs. 35,067 was reserved, leaving a profit *jumma* to *Roy Ram Kishen Doss* of about Rs. 10,500. A considerable amount of the rents reserved by the sub-leases was further secured by the *Singhs* to *Roy Ram Kishen Doss* by an *Ikrarnamah*, dated the 29th of *August*, 1837, mortgaging other property.

On the 7th of *June*, 1837, the *Singhs* signed a letter of assignment, directing *Roy Ram Kishen Doss* to pay the rent reserved by his lease to the Mortgagees.

On the 28th of *September*, 1847, the *Singhs* instituted a redemption suit against the Mortgagees

and *Roy Ram Kishen Doss*, and by their plaint alleged that, needing advances to pay off various Creditors, they had, prior to the preparation of the *ticca* lease, applied to *Roy Ram Kishen Doss*, the *Gomastah* or Manager of the Mortgagees' Bank, to lend them the money, and that they delivered to him the rent-rolls of the property, afterwards mortgaged, showing an income of Rs. 35,067. That thereupon *Roy Ram Kishen Doss*, as Agent of the Appellants' predecessors, caused the above *ticca* lease, mortgage deed, *kutkina* or sub-leases, *Ikrarnamah*, and Letter of assignment, to be executed by the *Singhs*. That although the several instruments were expressed to be executed at different dates, the transaction was, in fact, a single transaction; and the execution of the mortgage and lease in different names, and on apparently different dates, was merely a contrivance to evade the Usury laws, and to enable the Mortgagees to recover or appropriate an amount of interest beyond the legal rate. That the whole amount of principal and interest properly recoverable by the Mortgagees had been paid off from the usufruct of the mortgaged property, and that at the date of the plaint there was, in fact, a balance due to the *Singhs*. The plaint contained a statement of the accounts showing that the sum of Rs. 613. 8. was the balance due to the *Singhs*, and concluded by praying, that the deeds might be cancelled, and that the Mortgagees might be directed to pay the balance due from them.

The Mortgagees, by their answer, denied that any connection existed between them and *Roy Ram Kishen Doss*, or between the mortgage deed and the *ticca* lease; and alleged that, so far from the prin-

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principal and interest secured by the mortgage having been paid off, the whole principal moneys, together with an arrear of interest, was still due.

Roy Ram Kishen Doss by his answer admitted possession of the property, but denied that any connection existed between him and the Mortgagees. He did not at that time allege, that he had not realized and received the full amount of the annual *jumma* of S. Rs. 24,858. 10a. reserved by the lease granted to him; but, on the contrary, insisted that by the terms of his lease he was personally entitled to any profits he might make beyond that sum.

Evidence was entered into by both parties. By the *Singhs* to prove that the mortgage and lease were one transaction, and a mere contrivance for exacting illegal interest, and by the Mortgagees and *Roy Ram Kishen Doss* to prove, that there was no connection between the mortgage and *ticca* lease.

On the 26th of *August*, 1850, the Principal *Sudder Ameen* of *Zillah Sarun* (*Mirza Sudeek Khan*) gave judgment on the issue so raised, and decided that the mortgage and *ticca* lease were separate transactions, and dismissed the claim of the *Singhs* with costs.

Against that decision the *Singhs* appealed, and on the 14th of *July*, 1852, three of the Judges of the *Sudder Dewanny Adawlut*, Messrs. *Colvin*, *Mills*, and *Mytton*, gave judgment on the appeal, and decided that the *ticca* lease to *Roy Ram Kishen Doss*, and the *rehunama* (mortgage) to the banking-house of *Shah Behari Loll Rughooburdial* were to be considered as one transaction, in the light of a simple usufructuary mortgage so contrived as to evade the Usury laws. Their reasons were, that the *ticca* lease was distinctly

granted to the Agent of the Mortgagees, and the whole of the documents connected with the arrangement were evidently designed for the purpose of leaving the Plaintiffs in possession of the property, under the form of sureties of nominal *Kutkinadars*, they paying a rent of Rs. 35,067, the balance (after paying the Government revenue) of which was for the benefit of the Mortgagees. That the Plaintiffs have not come into Court to ask that the principal should be declared forfeited in consequence of infraction of the law of usury; but they had simply stated, that from the usufruct the Defendants had realized more than the principal and stipulated interest, and, therefore, prayed that the property mortgaged might be restored to them. That the Respondents' Pleader had given up the plea of multifariousness, which indeed could only doubtfully apply to the case. The Court thought it sufficient, with respect to the property sued for as pledged under the *ikrar* of August, 1837, to treat that part of the suit as null. As regarded the other *mouzahs* involved in the transaction of the 18th of May and the 5th of June, 1837, the Court was of opinion that, under section 10 of *Ben. Reg. XV.*, of 1793, the Mortgagors had a right of re-entry, provided that the principal sum, Rs. 1,50,000, with the simple interest thereon, had been realized from the usufruct of the property, of which the profits of the *ticca* farm were to be considered a portion, and that, although the period of the deeds might not have expired. That the law was distinct and unmistakable, that all such mortgages were to be considered cancelled, and redeemed whenever the principal sum and interest shall have been realized. That for the Respondents it had been contended, that if other

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conditions of the deed were to be set aside to his prejudice, that one limiting the interest to 12 *annas per cent. per mensem*, should also be set aside in his favour, and the full legal interest allowed. The Court found, however, that the law would not admit of that; section 5, *Ben. Reg. XV.*, of 1793, ruling that no higher interest than that stipulated between the parties was to be decreed. That for the above reasons, in reversal of the decision of the Principal *Sudder Ameen*, they remanded the suit of the Plaintiffs, *quoad* the property covered by the *ticca* lease and *rehunama* (mortgage), and directed an account to be taken as to the sums realized by the *Ticcadars*, or Mortgagees, up to date of suit; and if they amounted on that date to the principal sum lent, Rs. 1,50,000, with interest thereon at the rate of 12 *annas per mensem*, they directed that possession should be given to the Plaintiffs; and that any sum beyond that, and not over and above the excess sued for, and any collections made subsequently to that date of recovery of possession, with the ordinary interest thereon to date of payment, should be refunded, and made good to them. The *wasilat* on the other villages pledged in the *ikrar* of August, 1837, were not to be included in the account above directed to be taken.

None of the Defendants appealed against this decision of the *Sudder Court*.

After the suit was remanded by this decision, the Judge of *Zillah Sarun* transferred it to the file of his own Court.

By a proceeding, dated the 17th of *December*, 1853, and recorded under sec. 10 of *Ben. Reg. XXVI.*, of 1814, the *Zillah Judge* of *Sarun* fixed the issue to

be tried as follows: "What sum has been really realized by the Mortgagees from the estate?" and that it was necessary,* for this purpose, that the accounts should be rendered by the Defendant in the manner laid down in sec. 11, of *Ben. Reg. XV.*, of 1793.

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By another proceeding of the same Court, of the 18th of *April*, 1854, the Pleaders of the Mortgagees were asked if they would file the papers of the gross collections from the *Ryots* of all the *mouzahs*, and they answered that they could not, whereupon the Judge ordered that an *Ameen* should be appointed to ascertain the mesne profits and gross collections of the *mouzahs*.

The *Ameen* appointed to take the accounts accordingly proceeded to the property, and having instituted inquiries, settled the accounts as required, which showed that an amount in excess of the principal and interest had been obtained by the Mortgagees.

On the 6th of *September*, 1855, the suit came on again for hearing before the *Zillah* Judge, Mr. *H. Atherton*, who stated that, after consideration of the statements of each party, a careful attention to the circumstances of the case satisfied him, that the *Ameen's* papers showed a far greater sum than was ever likely to have been realized, or than was proved in any way to have been realized; and he stated himself to be convinced that the Mortgagees were deceived when they made the advance to the Plaintiffs on the terms of nine *per cent. per annum*. The Judge then formed a calculation on materials which were not before the Court, and in respect of which there was no evidence, and ultimately decided that Rs. 51,306 12a. 6p. principal were due to the

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Mortgagees at the date of suit, and dismissed the claim of the *Singhs* with costs.

Against this decision cross appeals were preferred to the *Sudder Dewanny Adawlut*. The ground of the *Singhs'* appeal being, that the account and calculation of the *Zillah* Judge was wrong, and that under the provisions of sec. 11, *Ben. Reg. XV.*, of 1793, the parties in possession of the usufruct should have been first compelled to produce and verify their own accounts. The other parties urged, as a ground of their appeal, the mode in which the accounts were taken ; that the suit was not admissible until the term of the lease had expired, and that the transactions of the lease and mortgage were distinct.

On the 26th of *October*, 1857, the *Sudder* Court, consisting of Messrs. *Patton*, *Sconce*, and *Torrens*, gave judgment on the appeals ; and after disposing of a preliminary question, the judgment proceeded as follows :—" We, therefore, enter at once on the question relating to the accounts, including the objection taken by the (Plaintiff) Appellant, in No. 311, that the Mortgagees in possession had not rendered any account, as required by law. We observe, that this failure on their part should most properly be considered a default, to the consequences of which they might have been held strictly liable, had it not been, as shown by the Judge's proceedings in the deputation of an *Ameen*, and in other respects, that under the direction of the Judge, the Defendants understood that the production and verification of their accounts was not of necessity required of them. The first step, certainly, for the Judge, in a case of the kind, was to enforce this from the Defendants, and without their compliance he should not have had recourse to

the deputation of an *Ameen*. Notwithstanding this error in the Judge's proceedings, taking into consideration the very long time during which the suit has been pending, the Court has directed its attention to the detailed objections which are preferred to the accounts drawn up by the Judge, with a view, if possible, of making corrections, and passing final orders, without the necessity of again remanding the case. We find, however, that the primary error of no accounts having been verified by the parties in possession renders this course impracticable. When the Judge had last the accounts before him for decision, he had several very conflicting statements to consider:—First, that of the Plaintiffs, which gave the net profits of the Mortgagees at the full amount of the debt, with interest, leaving a surplus balance due to themselves. Second, the statements of the Defendants, which gave the collections brought to credit for liquidation of the debt only at Rs. 128,478. 10a. 3p., all of which sum was swallowed up in payment of interest; and, lastly, the accounts prepared by the *Ameen* after the local inquiry which the Judge had himself directed, but which he found it necessary to set aside, as well as the other statements. The mode of adjustment which he adopts, as given in his own words, was as follows:—‘It being absolutely impossible to ascertain the exact amount collected from the *Ryots*, I have, during the years in which the *mouzahs* were let in farm, except during the first year (*i.e.*, when the *kutkinas* stood) added 10 *per cent.* to the farming *jumma*; and taking this sum as representing the collections from the *Ryots* by the Farmers, after payment of collection expenses at 10 *per cent.* during the first year, S. Rs. 35,067, less the *jumma*

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of *Tolah Purvez Khan*, for as this settlement broke down the first year, it cannot be supposed the Farmers gained anything by it, or did more than pay their expenses. I estimate the farming profits at 20 *per cent.*, including the collection expenses; and deducting 10 *per cent.* for these and the management charges, the 10 *per cent.* added to the foregoing *jumma* gives, I believe, a sum for which the Mortgagees must be considered liable; and I am persuaded they cannot be answerable for more, nor do I believe as much would have been realized if the *mouzahs* had been retained in *khas* management after the first year. The years, however, during which the *mouzahs* were not in farm are very few in number, and this satisfies me *khas* management was not considered by the Mortgagees to be most profitable. Had it been so, the *mouzahs* after the first year would not have been given in farm at all. The amount of collections I have fixed with reference to the *Ameen's* and *Putwaree's* papers, and the farming *jummas* obtained for the same *mouzahs*. The Mortgagees do not appear to have made fraudulent settlements with their own people.' The Judge then throws out sums charged in the *Ameen's* accounts to the Defendants, collected on account of value of trees, as well as sums for which they had claimed credit of law expenses, &c., &c. The objections urged to this mode of adjustment by the Judge are various, the (Plaintiffs) Appellants, in case No. 311, objecting that certain *kabooleats* filed by the other party, and admitted by the Judge, to show the farming *jummas* after the first year, had not been attested, and the (Defendants) Appellants objecting that the *kutkin a jumma* to its full amount had not been realized in the

first year, and that they had been charged with the *jumma* of *Tolah Purvez Khan*, and other *mouzahs* not in their possession. On the whole, we conceive the best course is to return the case to the Judge, with instructions that he call on the Bankers to duly file and attest their own account-books, which show the actual receipts by them on account of this *mehal* under the mortgage; that these accounts be taken together with those of *Roy Ram Kishen Doss*, showing the collections from the *meial*, some of which papers he appears already to have filed, though they have been unnoticed by the Judge, and let unauthenticated and unattested. The *kabooleats* which *Roy Ram Kishen Doss* has filed to show the farming *jummas* under him after the *kutkina* leases first granted had fallen, should also be inquired into and attested, all with reference to the provisions of section 11, *Ben. Reg. XV.*, of 1793; and in conducting this inquiry and verifying the accounts the Judge can apply the provisions of sec. 5, Act, No. XIX. of 1853."

Mr. *Sconce* added an additional note as to the manner in which the accounts should, in his opinion, be taken.

There was no appeal from this decree, the effect of which was, that the Defendants to the suit admitted their liability as Mortgagees in possession to file and prove, as provided by sec. 11, *Ben. Reg. XV.*, of 1793, the accounts showing the actual collection made and expenses incurred during the period to which the suit related.

Upon the suit going back to the *Zillah* Court after such second remand, all the parties beneficially interested in the principal moneys and interest secured by the mortgage showed a very strong disinclination to

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be sworn to the accounts. And it was alleged that *Roy Ram Kishen Doss* was at *Benares*, and by reason of his extreme old age he has desirous of staying there. The Judge of the Civil Court, by a proceeding, dated the 26th of *June*, in 1859, excused the personal attendance of the parties beneficially interested, but declared that the presence of *Roy Ram Kishen Doss* was absolutely necessary. But *Roy Ram Kishen Doss* having obtained a medical certificate, the Civil Court ultimately directed a commission to issue for his examination, and transmitted formal interrogatories, together with the Books of the Banking house, for the purpose of such examination. Such a course of procedure precluded any cross-examination of the witness. The examination consisted of the answers to three questions. In his deposition, *Roy Ram Kishen Doss* identified twenty Books as showing the accounts of collections made during the period to which the suit related. The Books so sent did not appear to have been withdrawn from the precincts of the Court of *Benares*, yet *Roy Ram Kishen Doss* deposed to having fully examined the Books, and to having made up an abstract showing the results of the accounts therein contained. By his own admission he had not seen the Books before for a period of more than five years. He did not allege, that the entries in the Books had been made by him or under his superintendence. By his evidence it appeared that, not only was no part of the principal moneys secured by mortgage discharged, but that, in addition, at least Rs. 7,000 were due in respect of the principal, and Rs. 13,900 were due as interest. On behalf of the Mortgagees, nine witnesses employed in their Banking business at *Chuprah* were called to prove

the correctness of the entries in the twenty Books produced. Some of these witnesses could not read or write, and none of the witnesses were in a position to depose to the alleged entries in the Books, which included the receipts under the mortgage. No witnesses were called to prove the actual receipts and disbursements.

On the 20th of *May*, 1859, the *Zillah* Judge, Mr. *H. Atherton*, for the third time pronounced judgment in the suit. Such judgment was as follows:—"The account of the sums which I considered the Mortgagees should be held to have realized was prepared in consequence of the Court's decision of the 23rd of *December*, 1852, having determined that the sums actually realized from the *Ryots* should be ascertained where a middleman had been created between the Mortgagees and the *Ryots*; and in the case in which that rule was made no fraud was established as the ground of its necessity. I, therefore, considered that it was necessary to hold the Mortgagees answerable for the account of settlements made by them with the Farmers, and such further profits as the Farmers might themselves have obtained. The Mortgagees from the first, object that many of the farming leases made by them broke down, and that they never realized the sums agreed to be paid by the Farmers; but it seemed to me, that they should be held answerable for the arrangements made by themselves, and that they should be held to have received the sums engaged for. The Mortgagees have now given in their Books and accounts, proved by those who have had the management of their affairs, and declared to be correct; and these show, as the Mortgagees have all along declared, that the sums

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realized from the mortgaged villages do not, after deducting expenses of management and payment of the Government *malguzary*, equal the amount of interest due on the advance made to the Plaintiffs; and the question is, Can these books and accounts be accepted? The Plaintiffs in argument do not deny, that the Mortgagees gave *pottahs* to the parties whose *kabooleats* are produced; but they say, that the leases were fraudulent; there is, however, no proof of this—nothing to show clearly, that during the time embraced by the suit the Mortgagees actually realized more than their accounts show—though balances could, of course, be recovered afterwards; and suits, it is alleged, have since been going on against some of the Farmers holding under the Mortgagees. But the actual receipts to the date of suit have now, by the Court's orders, to be considered, and under all circumstances of the case, I think the collections according to the Defendants' account Books should, to a certain extent, be admitted. As I explained in my former decision, it is impossible to determine with anything like accuracy what sums may have been actually realized from the *Ryots* in any particular village, by the parties entitled to collect them, during a series of years; but there are in this case *data* on which a fair opinion may be formed as to the Mortgagees' receipts, and I think the Plaintiffs may, with strict fairness, be bound by their own Mortgage Bond, since it is well known that whenever a property is mortgaged by a *Zemindar*, and the deed does not expressly state that during a certain period principal and interest are to be realized from the proceeds, the *Zemindar*, on receipt of an advance, makes over property of such value that the yearly proceeds, as nearly

as can be calculated, equal the interest of the advance. Now the Plaintiffs, by their Mortgage Bond, agreed, at the end of the twenty years, to repay the advance in one sum, and the stipulated *jumma* was just enough to cover the interest of the loan, and the Government revenue, payable by the Mortgagees. The Plaintiffs, as shown in my former decision, acted with bad faith in representing the *Mofussil* assets of the villages at Rs. 35,067, and having so acted, may, I think, be held to have made over to the Mortgagees property the proceeds of which would about equal the interest on the advance; and in this case I think, as the actual receipts, according to the account-books, do not show an excess beyond the amount due for interest, the Mortgagees must be held not to have received more during the years of which the suit applies, but I would hold Plaintiffs free of all claim on account of the balance of interest, Rs. 13,914, said by the Defendants to be due to them up to date of suit. The Plaintiffs cannot show by receipts of the Mortgagees that, during the period under review, sums have been realized by them which are not entered in their accounts; and in such a case as this no less satisfactory proof can be admitted as invalidating the accounts declared to be correct by those who have prepared them. The Principals themselves have, it is asserted, and such assertion is not denied, never acted directly in this matter. They reside at *Cawnpore*, *Lucknow*, and *Muttra*, and their Banking business at different places is managed by their Agents, whose accounts they accept and declare to be true to the best of their belief. Holding, then, that it is not proved, that the Defendants, during the time embraced by the suit, have realized any portion of the principal,

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I dismiss the claim, with the Defendants' costs, and interest till realization."

From this decision the *Singhs* appealed to the *Sudder Dewanny Adawlut*, and on the 28th of June, 1862, three of the Judges of that Court, consisting of Messrs. *Trevor*, *Kemp*, and *Seton-Karr*, gave judgment on the appeal as follows:—"We are unanimously of opinion, that the accounts filed in this case are not such accounts as the law requires to be furnished by a Mortgagee. The law, sec. XI., *Ben. Reg. XV.*, of 1793, in clear and unmistakable terms, requires the Mortgagee to deliver accounts of the 'gross receipts,' and of his expenditure. 'Gross receipts' we hold to mean, the gross sums paid by the tenantry of the estate mortgaged. It is the positive duty of a Mortgagee to file full and complete accounts, and such accounts must be attested by the Mortgagee; the attestation of an Agent or Servant is wholly insufficient. The Mortgagees have not been able to show us any invincible disability on their part to perform the mandatory requirements of the law. The banking Books filed by the Mortgagees were not filed with the answer, but eleven years after the institution of the suit; and even admitting that these accounts are above suspicion, they are not the accounts which the law requires a Mortgagee to furnish. It is true, that *Roy Ram Kishen Doss*, the *Gomashtah* of the Mortgagees, has deposed to the truth and correctness of these accounts; but, as stated above, if such accounts are not the accounts which the law expects, then the attestation of the Servant of the Mortgagees is worth nothing. An attempt has been made by the Pleader of the Mortgagees to shift the responsibility of furnishing the accounts required by

the law upon *Roy Ram Kishen Doss*. It has been urged, that the Bankers had nothing to do with the *ticca* lease, or with the *Mofussil* management of the mortgaged properties, and that they have filed all the accounts in their power. We, however, find that this Court, in 1852, ruled that the mortgage and *ticca* lease were not separate transactions, but one transaction, entered into with a view of evading the usury laws. We, therefore, must hold the Mortgagees, and not their Servant, *Roy Ram Kishen Doss*, to be the parties responsible for the due fulfilment of the requirements of the law; and as they have withheld the accounts of the gross *Mofussil* receipts and expenditure, which accounts, if filed, would be the best and only legal evidence, the presumption is, that the production of these accounts would not bear out their plea of non-liquidation of the loan with interest from the usufruct of the mortgaged properties. We, therefore, proceed to estimate, in the best mode available, from the evidence adduced by the Plaintiffs, what amount has been realized on account of principal and interest by the Mortgagees. The Plaintiffs (the Mortgagors) have filed a detailed account of the sums received on account of principal and interest by the Mortgagees. This account embraces a period from 1245 *Fusly* to 1254 *Fusly*. The sums recovered on account of principal and interest for each year of account are exhibited, and the result is, that the whole sum advanced, or Rs. 1,50,000, with interest at the rate of 12 *annas per mensem*, or 9 *per cent. per annum*, had been more than recovered from the usufruct of the mortgaged properties. The Pleaders of the Respondents (Appellants) admit the *ticca* lease and the *kutkina* lease, and these documents show the

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gross assets of the mortgaged properties, together with the sum available after payment of the Government revenue for the gradual liquidation of the sum advanced, with the stipulated interest. The general correctness of these accounts has not been impugned by the pleaders of the Respondents (Appellants); but it was argued, that if the mortgage and *ticca* lease transactions are to be held one, and not separate, and entered into to evade the usury laws, the condition to limiting the interest to 9 *per cent. per annum* should be set aside, and the full legal interest be allowed; that if the calculation of interest be made at the rate of 12 *per cent.*, instead of 9 *per cent.*, the balance would be against the Mortgagors. This point, however, was decided by the Court in 1852; further, section 5, *Ben. Reg. XV.*, of 1793, rules that no higher interest than that stipulated between the parties is to be decreed. Holding, for the above reasons, that the Mortgagees have wholly failed to comply with the requirements of the law, and that there has been sufficient *primâ facie* and unrebutted evidence adduced on the part of the Plaintiffs (the Mortgagors) to show that the loan, with interest, has been fully liquidated; we, in reversal of the decision of the Judge, decree to the Plaintiffs re-entry over such of the mortgaged estates as have not passed into the hands of the Appellants in Nos. 431. and 432, with costs of both Courts."

Subsequently *Baboo Juggutputtee Singh*, one of the original Plaintiffs in the suit, died, and the Respondents, *Baboo Sree Kishen Singh*, *Baboo Baichoo Singh*, and *Baboo Joogul Kishore Singh*, were substituted as parties in his place, *Shah Rughoobur Dyal*, one of the original Defendants, also died; and

his Son, then *Shah Fuqueer Chand*, was substituted in his place; and *Roy Ram Kishen Doss* also died, and his Widow, *Doorga Dubi*, was substituted as a party in his place.

The Appellants presented to the *Sudder Dewanny Adawlut* the ordinary petition for leave to appeal to England, and the other Defendants, *Shah Mukhun Lall* and *Fuqueer Chand*, also presented a separate petition to the Court for the same purpose, and leave to appeal was respectively granted. The representative of *Roy Ram Kishen Doss* did not appeal.

As the interests of the Appellants in the matters in question were similar, though not identical, the appeals were heard together.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellants, *Shah Mukhun Lall* and *Shah Fuqueer Chand*.

Our contention is, that the *onus* of proving the liquidation of the whole of the mortgage debt and interest lay on the Plaintiffs in order to entitle them to a decree for the redemption of the mortgage and possession, which they failed to do, *Forbes v. Amee-roonissa Begum* (a). It appears, however, on the contrary, from the accounts filed and the evidence, that a large balance, in respect of the mortgage debt, was still remaining due when the suit was commenced. The mortgage accounts filed by the Defendants, as heirs of the Mortgagees, and by their Agent and Trustee, *Roy Ram Kishen Doss*, were the proper accounts; and they were duly verified with reference to the circumstances of the case. The Interlocutory decree of the late *Sudder Court* of the 26th of *October*,

(a) 10 Moore's Ind. App. Cases. 340.

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1857, remanding the suit, and directing the Mortgagees to verify their accounts, was founded in error. It is true no appeal was taken from that decree with respect to the operation of the 11th section of the *Ben. Reg. XV. of 1793*, and the Act, No. XIX. of 1853, sec. 5, yet it is not now too late on an appeal from the final decree to impeach that decree, *Jones v. Gough (a)*; *Forbes v. Ameeroonissa Begum (b)*; *Maharajah Moheshur Sing v. The Bengal Government (c)*. The accounts were rendered under the Act, No. XIX. of 1853. Even if the final decree of the *Sudder Court* appealed from was right in deciding that the mortgage accounts were neither proper accounts nor properly verified, which we deny, yet the decree was wrong in not remanding the suit to the *Zillah Court*, in order that the proper accounts might be filed and verified, instead of decreeing, as it did, in favour of the Plaintiffs for redemption of the mortgage and possession of the mortgaged lands.

Mr. *Charles G. Smith* appeared for the other Appellants, *Shah Koondun Lall* and *Shah Phoondun Lall*, but was not heard.

Mr. *Kay*, Q.C., and Mr. *Pontifex*, for the Respondents.


As the original transaction of mortgage has been held by the Courts below to have been merely a contrivance to enable the Mortgagees to extract from the Mortgagors more than the legal rate of interest, it was an infraction of the law of usury, and, therefore, void under the provisions of *Ben. Reg. XV. of*

(a) 3 Moore's P. C. Cases (N. S.), 1.

(b) 10 Moore's Ind. App. Cases, 340.

(c) 7 Moore's Ind. App. Cases, 283.

1793, sec. 9; *Wise v. Kishenkoomar Bous* (a); and consequently, the Appellants are not legally entitled to require payment from the Respondents either of principal or interest. The allegations in the plaint, and the evidence adduced by the *Singhs*, showed that the mortgage loan, with interest, had been fully liquidated; and, therefore, it having been proved that the mortgaged property was let at an annual rent of Rs. 35,067, at the commencement of the mortgage transaction, the *onus* was on the Appellants to show that such was not the aggregate rent during the whole period of their possession, *Forbes v. Ameeroonissa Begum* (b); the *onus* is on the Mortgagees in possession to prove that the principal and interest is not paid by perception of the profits, *Blackwell v. Bowes* (c); and in the absence of proper accounts, which the Mortgagees were bound to file, *Ben. Reg. XV.* of 1793, sec. 11; *Gould v. Tancred* (d); which could be the only legal evidence against the Respondents, having failed to show that the aggregate rents during such period did not amount to Rs. 35,067, the accounts stated by the Respondents must be accepted. In a loan transaction of such magnitude, it is not credible that the lenders would not, previously to advancing the mortgage money, have inquired into the income derivable from the property mortgaged, or that in one of the instruments connected with the transaction they would have permitted such income to be stated at that sum, without having satisfied themselves that such amount was capable of being realized. In such a transaction originally fraudulent, and under the

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(a) 4 Moore's Ind. App. Cases, 201, 218.

(b) 10 Moore's Ind. App. Cases, 340, 358.

(c) Sel. Cases in Ch., 1725.

(d) 2 Atk., 533.

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circumstances connected therewith, it cannot be supposed that the Mortgagees did not keep full and correct accounts of the gross receipts from, and the expenditure and outgoings incurred in respect to, the property mortgaged. The neglect of the Appellants to file such accounts makes the presumption inevitable that such accounts, if they had been filed, would have supported the case made by the Respondents.

Sir *R. Palmer*, Q.C., in reply.

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Judgment having been reserved, was now delivered by

The Right Hon. LORD CHELMSFORD.

This is an appeal in a mortgage suit instituted more than twenty years ago. The original Plaintiffs, the Mortgagors, named *Singhs*, sued in the Court of the *Sudder Ameen* of the *Zillah Sarun*, the representatives of the original Mortgagees named *Lall*, who were eminent Bankers, having *coties* in various parts of *India*, and also one *Roy Ram Kishen Doss*, the *Gomashtah* of the firm, to cancel on redemption three several instruments, viz., the Mortgage deed, lease, and agreement named in the plaint, and which will hereafter be more particularly described. These instruments the Plaintiffs alleged to constitute one mortgage security of the Bankers, the *Lall* Defendants. All the Defendants asserted, however, as to two of these instruments, viz., the lease and the agreement, a different title and interest, conferring a separate interest, as distinct from the Bankers, on their *Gomashtah*, the last Defendant.

The lease bore date the 16th of *May*, 1837; it was for twenty years, and reserved a rent of S. Rs. 24,858 10a., payable to the *Singhs* by the *Gomashtah*. The mort-

gage deed bore date the 5th of *June*, in the same year, and pledged the same property also for twenty years to the Bankers, to secure a loan of S. Rs. 150,000 from them to the *Singhs*. The interest reserved was nine *per cent*. Ostensibly, the Mortgagees were entitled to the rent alone, the surplus of which, after deducting the Government revenue, left a balance of Rs. 13,500, exactly the sum calculable as interest on the loan at nine *per cent*. *Roy Ram Kishen Doss* granted, as apparently a subsidiary arrangement, sub-leases to certain *Kutkinadars*, nominees of the Mortgagors, at rents aggregating S. Rs. 35,067; and the Mortgagors guaranteed to him those receipts of rent. Ostensibly, therefore, the several instruments evidenced a mortgage transaction, providing only for interest alone from the usufruct, leaving the principal debt to be paid otherwise in full, and a beneficial lease in the *Gomastah* yielding an annual profit of Rs. 10,200. All the Defendants insisted that the ostensible was also the real character of the instruments.

The *Ikrarnamah* was executed by the Mortgagors, the *Singhs*, to the *Gomastah* on the 29th of *August*, in the same year, as a security to cover certain losses incurred or anticipated from adverse claims, for the due payment of their rents by the sub-lessees, the *Kutkinadars*, and for a further advance of Rs. 7,000, bearing an interest of twelve *per cent*. The Plaintiffs sought also to recover possession, alleging the Mortgagees, the *Lall* Defendants, whom they treated as Mortgagees in possession, to be satisfied from the usufruct, and further claimed as mesne profits a small alleged surplus from the same source.

This claim, then, of the Mortgagors to redeem before the twenty years were past, was denied in

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respect of all that the lease covered, which was the whole that the mortgage deed included. The suit further raised these questions: at what rate of interest, whether nine *per cent.* or a higher rate, the Plaintiffs were entitled at any time to redeem; whether the loan was at usurious interest; and whether the several instruments were a device or means, within section 9 of *Ben. Reg. XV.* of 1793, to conceal usury, and so evade the Usury laws.

The suit, therefore, involved issues of title, and not simply one of payment on an admitted title to redeem under a contract, raising no question as to the terms of redemption.

The suit was heard in the *Sudder Ameen's* Court, which decided in the Defendants' favour on all the issues. From that decision there was an appeal to the *Sudder Dewanny Adawlut*, which decided that the three instruments formed one mortgage security, as alleged in the plaint, and were a device to conceal usury, that the contract was usurious, but that as the plaint was for redemption, the Mortgage was redeemable on payment of the principal and nine *per cent.*, the interest expressed to be payable in the Mortgage deed; and the Court, reversing the finding, sent the case back to be tried in the Court below on the inquiries which it directed, and which were limited in effect to satisfaction of the Mortgage at the date of suit. The cause was then transferred from the *Ameen's* Court to that of the *Zillah* Judge, who, before he proceeded to try the question submitted to him, called for the accounts of the gross receipts and disbursements directed by Regulation XV. of 1793, sec. 11. The Defendants, who subsequently renewed the dispute as to the unity of the

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title, declared themselves unable to give the accounts demanded of them. The Judge then deputed an *Ameen* to take an account of, and report as to the receipts. The *Ameen* reported, and found that the Defendants were overpaid, to a much larger amount than the Plaintiffs' own case declared them to be. The Court rejected that report, went itself into the inquiry, found the Plaintiffs still indebted on the account, and dismissed the suit. From that decision there was again an appeal to the *Sudder* Court, which reversed that decision, directed that the accounts should be produced, and further, directed certain additional inquiries to be made, the precise character of which need not here be stated. The cause was again heard, after much preliminary litigation as to the nature of the accounts required, and the proper mode of verifying them.

The Court again decreed in favour of the Defendants, declaring a considerable sum, exceeding Rs. 50,000 to be still due, and on that ground dismissed the Plaintiffs' suit with costs, without any declaration as to title. From this decision the Plaintiffs, and also the Defendants, appealed to the *Sudder* Court, the Defendants raising anew their contention as to the rate of interest, that twelve *per cent.* should be declared to be the due rate. The *Sudder* decided the case in favour of the Plaintiffs, and decreed their claim in full, except as to the *wasilat*, and from that last decision the present appeal is brought.

The accounts received in the Court below were declared by the *Sudder* Court not to be the proper accounts, and that Court considered itself entitled to presume, from the non-production of the right

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accounts, that they, if produced, would show the mortgage satisfied. The statement of the rental and the accounts annexed to the plaint formed the basis of the decision, the correctness of which, as to the amount of income in the time of the Mortgagor's possession, they considered to be *primâ facie* established. The accounts actually rendered were the Banking Books of the Defendants' Banking firm, containing a statement of their receipts; and the accounts of the *Gomastah* of the Bankers, who was, in truth, the person, as Manager, best acquainted with the transactions, and a Trustee, as it was found in effect, for the Mortgagees. He was examined under a commission, and deposed to the correctness of the accounts which he gave in. The existence of any other accounts did not appear.

As the Regulation required the Mortgagees to swear to the accounts, the Court considered the attestation by the *Gomastah* insufficient. On this last appeal to the *Sudder*, the question of the rate of interest was again raised by the Defendants in their objection to the appeal; the Judges said they had already decided the question, and again declared that they abided by their decision, thinking it correct. They expressed no opinion whether they were excluded by their procedure from reconsidering the matter on a new appeal to them. It is not at all material to the decision of this case to determine, whether they could or could not have entered into that question, in any way, had they thought their previous opinion on the point erroneous. Their Lordships think, that the question as to the interest is open on this appeal, though the Plaintiffs might have appealed, and did not, from the Interlocutory

decree on the point. This point is governed and settled by the cases of *Forbes v. Ameroonissa Begum* (10 Moore's Ind. App. Cases, 340) and *Maharajah Moheshur Sing v. The Bengal Government* (7 Moore's Ind. App. Cases 283).

The first question to be determined by their Lordships is, whether the decision of the *Sudder Dewanny Adawlut*, that the interest must be calculated at nine *per cent.* only, is correct. It is clear, that if the Mortgagees had been suing the Mortgagor on the mortgage deed for the debt, they could have recovered no higher rate of interest than nine *per cent.*, the contract being in writing, and incapable of being varied by parol evidence; but this is by no means decisive of the question; for supposing that the extra profits on the several engagements forming one mortgage security had amounted only in the whole to three *per cent.*, making up twelve *per cent.* only in all, precisely the same consequence would have ensued; the reserved interest would have been correctly viewed as constituting part only of the profit, and as such would have been all that the parties stipulated for as to that part of the transaction, but it would not have measured the stipulated return for the loan annually. The rules of evidence, and the law of estoppel, forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protection; one of which is, when one party, for the advancement of justice, is permitted to remove the blind which hides the real transaction; as, for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature

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for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded, not so much on any positive law, as on the broad and universally applicable principles of justice. The case of *Forbes v. Ameroonissa Begum* (10 Moore's Ind. App. Cases, 356) furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships,—"The Respondent cannot both repudiate the obligations of the lease, and claim the benefit of it." Unless, therefore, some positive law has said that in cases similar to the present, the written engagement, though not extending to the whole profit stipulated, must be adhered to against the Defendant, though the Plaintiff may go beyond it, to show the full extent of the profit, and so to be relieved from the consequences of his actual contract, their Lordships must hold, that the bargain disclosed should be performed so far as the law allows; in other words, that twelve *per cent.* was in this instance the interest to be computed.

The decision of the Judges of the *Sudder Dewanny Adawlut* on this point, was founded, not on any grounds of equity, but upon their construction of the Law. They considered that they were bound, by the terms of the 5th section of Regulation XV. of 1793, to give no more than the interest stipulated, and that

nine *per cent.* was that rate of interest, thus in reality begging the question in dispute. Their Lordships have, therefore, to consider the real meaning of the words used in that section, which meaning will be best ascertained by an examination of other parts of that Regulation.

In *India*, amongst the Hindoos, the restriction as to interest by their law was, that interest stopped when it equalled the loan. The interference with the rate of interest is, therefore, a thing of positive law, and cannot be extended beyond the provisions of the Regulation. By the 2nd section of the Regulation in question, a minimum rate of interest, and that a high one, much in excess of twelve *per cent.*, was directed to be decreed; and by the 3rd the maximum rate of interest was reduced to twelve *per cent.*, in the case only of debts exceeding 100 sicca rupees. The rates prescribed by the Regulation in the several cases enumerated, were fixed rates, constituting both a maximum and minimum in the cases aforesaid, which were limited to contracts between, and prior to, named dates. Then, by the 4th section, in causes of action arising on or after the 1st *January*, 1793, the Courts were not to decree any interest on any sum whatever, above the rate of twelve *per cent. per annum.* From that time this was the limit beyond which no claim to interest could be enforced in respect to contracts entered into after that date; and it practically governed other cases where interest could be decreed, irrespective of contract. But inasmuch as the words of the earlier sections standing alone might seem to prescribe a rate of interest irrespective of agreement, and so lead to misapprehension of the meaning of the law, the

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framers of it, by the 5th section, declared further, that if a lower rate of interest than any of the rates authorized to be awarded shall have been stipulated between the parties, no higher rate of interest than the rate so stipulated is to be decreed. This plainly relates to the real agreement between the parties, constituting an actual legal stipulation; for it constitutes a limitation of the 4th section, as well as of the others. It does not extend to the cases comprised within the 9th section, where a device or means are used to disguise the real contract as to interest, for the provisions are inconsistent. The language of the 5th section would be violated by a construction of the word "stipulated," which would confine it to "expressed." Such a construction would be an extension of a penal enactment to a case not within its language and obvious objects, and that where another section did provide for the case before the Court.

The 6th, 7th, and 9th sections apply in terms to remedies in suits brought to enforce, not to suits brought for relief against a contract. To bring a case within the 8th section, the excess must be specified in the contract itself. The 9th section does not declare the contract itself void, nor direct any pledge to be returned, without redemption. The 10th section furnishes an argument, that such was not the design. But even if this did not appear, a penal law, and especially one of so peculiar a character as that contained in the 9th section of this Regulation, is not one to be extended by construction. This section is one *in pænam* against the concealment of the usury; for the open violation of the Regulation entails, under section 8, only a forfeiture of interest. If the 9th

section were so extended by construction as to invalidate the contract itself, and make it, and the conveyance also obtained under it, null and void, then, inasmuch as there are no saying words, an innocent purchaser without notice, from the Mortgagee, by assignment of the pledge, would be unable to retain it, even for the just debt and legal interest. Their Lordships, therefore, think that the only section of the Regulation at all applicable to the present suit brought by a Plaintiff to set aside his contract, and have restitution of the pledge on terms of redemption, is the 10th section. If any case were needed to enforce so plain a rule (which, however, has been questioned), that of *Eshenchunder Singh v. Shamachurn Bhuttoo* (11 Moore's Ind. App. Cases 20) emphatically points out, in the language of Lord *Westbury*," the absolute necessity that the determinations in a cause should be founded on a case either to be found in the pleadings, or involved in or consistent with the case thereby made." The present suit is one for redemption, not for declaring a forfeiture, and must be decided according to the rules applicable to the former suit. If the transaction were simply void, and no estate at all passed, it is obvious that the remedy to recover the land would be a possessory suit, against which limitation would run from the moment of entry. It cannot be treated as a voidable or redeemable estate between Mortgagor and Mortgagee, for one purpose, viz., to escape the limitation law, and as a void estate for another. If the estate in the lands created by the lease can be determined before the expiration of the twenty years, that can only be effected by coming to the Court for equitable relief, and submitting to the usual terms on

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which such relief is granted. What, then, are these terms? The Court will not, in the interests of justice, permit inconsistency and untruth of statement; will not permit a Plaintiff to say, "I promised to give the Defendant fourteen *per cent.* on his loan to me," and seek relief against him on that allegation; and permit him also the next instant to say, "the contract is expressed for nine *per cent.*, and I will tie my Opponent down to that term," that lower rate must be deemed to have been stipulated, and so to form the measure of his right to interest. The reply to this will be, "you have told us what the real bargain was, and on this statement you have made your application for relief, which you can obtain only on equitable grounds." Their Lordships find in the Regulations no positive law forbidding the application of these principles of justice to the case.

The 10th section rather leads to the contrary conclusion, viz., that in a case circumstanced like the present, the Mortgagee may retain his pledge until he has received out of it his debt, with interest at twelve *per cent.* At the time when this Regulation was passed, the receipt of profits in lieu of interest under a simple usufruct mortgage was common, as indeed appears by the introductory words of the clause. As to mortgages executed before the 28th of *March*, 1780, the usufruct might be allowed even after the Regulation, in lieu of interest up to that date. Then, after that date, that dividing point of time, and subsequently to it, the character of these mortgages suffered a change. The mortgage possession, instead of enduring by title for the stipulated time, was made liable to abridgment by satisfaction from the usufruct, and a claim to interest

arose in some cases where it did not exist before. The perception of the profits in many cases did not constitute receipt of interest, but was in lieu of any. Then, as to all usufructuary mortgages to be made after the dividing time which was before the Regulation, it makes also provision, and subjects alike, all the enumerated mortgages to cancellation and redemption whenever the principal sum, "with the simple interest due upon it," shall have been realized from the usufruct of the property subsequent to the 28th day of *March*, 1780, or otherwise liquidated by the Mortgagor. It applies, then, to all alike, though the circumstances of them all were not originally similar, subjects them to one provision, and imposes interest, in some cases, where there was no contract for it before. This section, having so provided, drops designedly the words "stipulated" and "specified" which would have been inappropriate in many of the cases, and uses, in more correct language, this expression: "the simple interest due upon it." This simple interest would, of course, in all cases where no interest was named, be twelve *per cent.*; but where a higher rate was named, against which the usufruct was to be a set-off, that is, a receipt "in lieu" of it, the reduced rate would be twelve *per cent.*, and all interest alike would be "due" by force of the enactment, even where interest did not exist before; therefore, as this is the case of an usufructuary mortgage, by means of which a profit higher than the return of twelve *per cent.* was to be made, and as relief is sought, viz., to have the pledge restored as cancelled or redeemed by satisfaction of the usufruct, the clause which is most closely applicable to the claim is the 10th section, the

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terms of which are large enough to embrace, and were designed, in fact, to embrace, some cases where the law itself made the interest "due." The Regulation, then, rather seems to favour than prohibit the restoration of the pledge, on the Court terms, that is, on reduced terms of interest imposed by the law. The real transaction appearing, and no prohibitory law intervening, the Court is left free to do justice in the particular case, and if the spirit of the 10th section regulate the case, it will sanction a redemption at the higher rate, allowing the actual contract so far as the law allows it. For the above reasons their Lordships think the interest should have been calculated at the higher rate of twelve *per cent.*

This view of the case would suffice to show, on the Plaintiffs' own estimate, that the decree appealed from cannot be maintained, since the allowance of twelve *per cent.* would, on that account annexed to the plaint, show that the mortgage was not fully satisfied at the date of the institution of the suit. Their Lordships, however, must proceed to consider the other objections urged to the decree, and to view the conduct of the parties through this long protracted litigation with a view to their decision on the subject of costs.

X The suit was brought to establish the title to redeem, for cancellation of the instruments, for possession of the lands, and payment of a small estimated surplus. It lay on the Plaintiffs to show that the Mortgagees were paid in full, out of their receipts. It was not also a suit to make the Mortgagees chargeable for non-receipt of profits, which they might have received with common care and attention. A

Mortgagee is not an assurer of the continuation of the same rate of profit which his Mortgagor was able to raise. Much depends, in *India*, on personal qualities. The very change of management and possession may cause a falling-off of receipts. Therefore, an estimate of a preceding rental does not suffice to show actual receipts, yet it is on this fallacious estimate, at the outset, that the calculation of the Plaintiffs, which they annexed to their plaint, proceeds. Again, the Plaintiffs make no deduction for those parts of the pledged property which turned out to be subject to prior charges, and the calculation of interest proceeded also on a wrong basis. Had these defects, apparent on the face of the plaint, been duly dealt with at the inception of the case, this long litigation might have been, if not ended, limited at least at an earlier stage. It is, on the other hand, to be remembered that the Plaintiffs claimed in their suit to have the character of the mortgage itself ascertained and decreed. In this they have succeeded, against a long, vain, and unfounded opposition, for the case of the Defendants, on this part of the case, when closely investigated, is found inconsistent. It is not credible that the Bankers would take, for so large a loan, a security which, on their present statement, has left them always losers, even of some part of the interest. The property was in the neighbourhood; the *Gomastah* was a man of business not likely to err so greatly in the valuation of the pledge: therefore, to this part of the claim a groundless defence was made, which has failed, and the suit has established a very important right in the Plaintiffs' favour, though they have proved to be wrong in their estimates of the receipts and the rate

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of interest. The conduct of the Mortgagees, in not giving in the accounts at an earlier stage, may be ascribed to the nature of their defence, and in no greater degree exposes them, than that defence itself does, to suspicion. If they meant to insist on that right, of course they would not have prepared and kept their account on an inconsistent principle. A great part, therefore, of the obstruction on this subject must be ascribed to this, that they viewed the transaction in its actual, whilst their Opponents and the Court viewed it in its legal, aspect. The case does not afford room for supposing that any extortionate interest was in view, though interest exceeding the legal rate has been stipulated for. The Mortgagees were Bankers, Traders probably, realizing in their business a profit beyond the legal rate of interest, and they may have meant no more than to realize a profit proportionate to the risk, in the calculation of which the danger of loss by litigation cannot be excluded.

The judgment now appealed from mainly proceeds on the non-production of the right accounts under Regulation XV. of 1793. Their Lordships incline to think that provision must, as regards this suit, be taken to be still in force and unrepealed by Act, No. XXVIII. of 1855. It is unnecessary to decide the point, as their Lordships think that, assuming it to be in full force, it has received, in the judgment under review, too strict an interpretation. Assuming it to be in force, what was the duty which it imposed on the Appellants? The duty to which they were bound by law, in the character ascribed to them by the decree, which was not questioned by the Appellants on this point, was to keep an account of the

gross receipts from the property mortgaged, and also the expenses of management and preservation. Some difficulties might attend a very rigid compliance with this Regulation. Their Lordships desire to enforce, by everything which may fall from them on the subject, the duty, as well as the policy and prudence, of keeping as full, complete, and plain an account of the transactions attending the management and receipts of an estate mortgaged as the nature of the case will admit. It is obvious, however, that the language of the section which applies to the common case, must receive a construction such as may suffice to accommodate its strict salutary provisions to the variable and different natures of estates and possession. The gross receipts must be such as the Mortgagor himself, previous to the mortgage, would have been entitled to, and if he could not, by reason of an intervening Lease, call for the account of the collections, neither can his Mortgagee; and also, if, at the time of the mortgage, a valid engagement, not designed to exclude accounting, is made by common consent, qualifying the nature of the usufructuary possession, the account of the receipts must be subject to that modification. The terms of the law are evidently not inflexible terms; and in like manner must be construed the provision as to the attestation of the truth of the accounts, which provision must necessarily be flexible, like the former; for the Mortgagee is to verify only his gross receipts and his expenditure, not the rents, nor the extent of arrears, nor the causes of such arrears; he is not, in fact, directed, then, to make out and verify such an account as might be established against him in a hostile suit, but only his gross receipts and his expenditure. The

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common rule *qui facit per alium facit per se*, would apply to him. What is done by his Agent is done by himself, and the accounts of the property managed by the Agent, though prepared by the Agent, are the Principal's accounts. He, though by delegation, must deliver in the accounts, and he must in some mode swear or depose that they are true and authentic. Must it necessarily be by his own personal oath in all cases? How can he do that if he knows nothing at all about them? He may have no belief, and may even suspect them to be false; for he may suppose himself to have been deceived by his Agent. Can the Legislature seriously be supposed to have contemplated anything so immoral as that a man should swear positively to knowledge of that of which he has, and can have, no personal knowledge. If it be urged that he may swear to his knowledge and belief, still that rational permission is a modification and expansion of the terms of the law. The words are without any exception, and in terms apply to Women, Infants, Lunatics, persons out of the Country, and others managing necessarily remote possessions, by Agents whom they must employ, and in whom they may confide. Can the Indian Legislature, which recognized *Gomastahs* by legislation, be supposed ignorant of their large authority and responsibility? And can it have resolved to make this direction to take an oath imperatively obligatory on every Mortgagee alike in every conceivable case? Their Lordships think otherwise. They think that the language which, like other provisions of the earlier Regulations, is curt and applied to the more common cases, must, to preserve even the spirit of the enactment itself, be construed reasonably, as admitting, in case

of necessity, of some delegation also in the person deputed to perform the duty of attesting the accounts. If the general Manager who did all, and knows all, with whom the Mortgagors, with that knowledge, contracted, whose name is used, whose accounts in one sense they are, and who, far more than mere representatives, knowing nothing of their own knowledge of the transactions, satisfies the spirit of the law by swearing to the truth of the accounts, it is such a reasonable compliance with the spirit of the law, at least, that its performance, in a case circumstanced like the present, by a substitute, furnishes no ground whatever for suspecting malpractice or designed evasion of the law, and with that alone their Lordships are concerned in this case, since the mere mode of the verification has no other importance in this case, than as it raises a case of suspicion against the accounts themselves. The mere mode of their verification, under the circumstances of this case, does not raise, in their Lordships' minds, any distrust. The contents of the accounts themselves, however, furnish more ground for doubting their accuracy. They show the interest alone not covered by the receipts. The Bankers and their *Gomastah* were experienced men of business. The loan is large. The property was not likely to be unknown to the lenders as to its general productiveness.

No change of circumstances accounting for so great a decline is disclosed, and the decision below of the Judge of the *Zillah* Court does not justify the conclusion that the whole debt, and some arrears of interest, still remain unsatisfied. Some explanation of this may be afforded by the circumstance that the Mortgagees long insisted on a state of

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accountability very different from that adjudged; and there does appear to their Lordships reason for thinking the accounts rendered to be so far unsatisfactory as to have justified the Court had it directed a further inquiry; that is, supposing the Plaintiff's prospect of success in his present suit to have been such as might have been prejudiced by the omission to direct that further inquiry.

Their Lordships, however, think that the *Sudder* Court was not justified in inferring, from the omission to render satisfactory accounts, under the circumstances of this case, that the mortgage had been satisfied when the suit was commenced. Had the state of the accounts, and the dealing as to them, raised a case of presumptive evidence of payment, still the conclusions from the evidence in this case cannot be supported; for the calculation of the Court is not formed on a correct basis, either as to the interest or as to the property; it makes no deduction for losses which the evidence in the cause discloses, arising from the partial loss of the property pledged, and some litigation which ensued thereon; it excludes, also, the evidence which the suit and the inquiries and proceedings subsequently to the Interlocutory decree afford, as does also the failure of the arrangement, through the instrumentality of the *Katkinadars*, that the collections never really equalled the gross estimated rental. This evidence, so far as it reached, destroyed, *pro tanto*, the presumptive evidence of the correctness of the estimated receipts. Presumptions, even *in odium spoliatoris*, have known reasonable limits. They must not be conjectures, nor grounded on *data* which the evidence itself shows to be inexact. Had this case

been one in which the whole account between these parties could be taken, their Lordships would have remanded the case for further hearing; or, had the Plaintiffs' own case disclosed a probability, even, that a further hearing could decide it in their favour, their Lordships, under its peculiar circumstances, would have been disposed to adopt the same course under some restrictive direction; but there is not the slightest ground for supposing the income of the estate larger than the Plaintiffs' own calculation; and even assuming that to be incapable of reduction, the allowance of twelve *per cent.* involved the dismissal of his plaint. In general, the dismissal of a suit should carry with it its consequence of liability for the costs, and this case is one brought against Mortgagees. But, in the opinion of their Lordships, the present suit affords several substantial grounds for a departure from that rule. The suit was brought, not simply for possession, on an allegation of satisfaction from the usufruct, but to establish the true relation between the Mortgagors and Mortgagees, the true nature of the case, the disguised usury, and the disputed unity in one mortgage title of the three several instruments before explained. So far it was successful, and it, therefore, cannot be ascribed to a litigious, vexatious spirit; it has established points most important to the future true adjustment of the mortgage accounts, and cannot be said to have been unproductive of future benefit to all concerned. And in respect of the costs of the proceedings had in the Courts below subsequently to the Interlocutory decree of the 14th of *July*, 1842, their Lordships have to observe, that those proceedings would have been unnecessary had the Appellants

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then appealed against the *Sudder* Court's decision as to the rate of interest; and, further, that the unsatisfactory result of the inquiries directed by that decree, and the failure of the Courts below to ascertain by evidence the actual amount of the gross collections, are, in some measure, due to the unsatisfactory character of the accounts rendered by the Appellants.

The appeal of the Judge of the *Zillah* Court simply dismisses the Plaintiffs' suit, which, in some important parts of it, had succeeded. That judgment, therefore, cannot be restored without alteration. Errors have been committed in this suit, in a nearly equal degree, by both Litigants. Their Lordships think, that the decree of the *Sudder* Court should be reversed, except so far as it reverses the decision of the Court below, and that it should be declared, that the mortgage, lease, and agreement mentioned in the plaint, and there alleged by the Plaintiffs to constitute one mortgage security, did constitute that one security; that the Mortgagees were the *Lall* Defendants, and the Defendant, *Roy Ram Kishen Doss*, was only their Agent, and had no interest in the lease or agreement distinct from that of the Mortgagees, who are accountable, as Mortgagees in possession, to the Plaintiffs in this suit for all moneys received by them in respect of the rents and profits of the mortgaged property by virtue of the said lease. That the three instruments were entered into with a view to evade the usury laws by a device or mean, within the meaning of the 9th section of Regulation XV. of 1793; and that the Plaintiffs were and are entitled to redeem at any time, though before the expiration of the twenty years' term created by the lease, on

payment or satisfaction of all that may be due on the mortgage securities for principal money, interest, and costs, such interest to be calculated at twelve *per cent.*; but that, it appearing that the Plaintiffs have failed to prove that the mortgage debt, with interest and costs, had been satisfied at the time of the institution of the suit, the said suit should be dismissed without costs, and that the decree of the Court below, of dismissal of the Plaintiffs' suit, should be restored, so far only as to include that Order of dismissal, with the declaration and alteration above stated, and that, with a view to the due enforcement of the Order of Her Majesty in Council, the High Court should be directed to remand the cause to the Court below, and to order the decree of dismissal simply to be restored, with the above declaration and alteration. And their Lordships will further advise Her Majesty, that each party should pay their own costs of the appeal to the *Sudder* Court, hereby partly reversed: and that any costs of such last appeal as may have been decreed and paid, and which are inconsistent with such Order of Her Majesty, should be refunded, or otherwise dealt with as justice may require. Their Lordships think, that the Appellants are entitled to the ordinary costs of this appeal; but they are of opinion, that those costs ought not to have been swollen by the severance, in defence of the four persons representing the original Mortgagees, and the presentation of two distinct appeals. They will direct the Registrar to tax these costs accordingly.

By the Order in Council made on the appeal, it was ordered, that the decree of the late *Sudder Dewanny Adawlut* at *Calcutta*, of the 28th June,

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1862, be reversed, except so far as it reversed the decision of the Court below, and that it be declared that the mortgage, lease, and agreement mentioned in the plaint, and there alleged by the Plaintiffs to constitute one mortgage security, did constitute that one security, that the Mortgagees were the *Lall* Defendants, and the Defendant, *Roy Ram Kishen Doss*, was only their Agent, and had no interest in the lease or agreement distinct from that of the Mortgagees, who are accountable, as Mortgagees in possession, to the Plaintiffs in this suit for all moneys received by them in respect of the rents and profits of the mortgaged property, by virtue of the lease; that the three instruments were entered into with a view to evade the usury laws, by a device or mean, within the meaning of the 9th section of Regulation XV. of 1793, and that the Plaintiffs were, and are, entitled to redeem, at any time, though before the expiration of the twenty years' term created by the Lease, on payment or satisfaction of all that may be due on the mortgage securities for principal money, interest, and costs, such interest to be calculated at twelve *per cent.*; but that it appearing that the Plaintiffs have failed to prove that the mortgage debt, with interest and costs, had been satisfied at the time of the institution of the suit, the suit is to be dismissed without costs, and the decree of the *Zillah* Court, of the 20th of *May*, 1859, for the dismissal of the Plaintiffs' suit, restored, so far only as to include that Order of dismissal, with the declaration and alteration above stated, and with a view to the due enforcement of this Order, Her Majesty is further pleased hereby to direct the High Court to remand the cause to the Court below, and to

order the decree of dismissal simply to be restored, with the above declaration and alteration; and that each party are to pay their own costs of the appeal to the *Sudder* Court, hereby partly reversed; and that any costs of such last appeal as may have been decreed and paid, and which are inconsistent with this Order, are to be refunded, or otherwise dealt with as justice may require.

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MUTTUSAWMY JAGAVERA YETTAPPA
 NAICKER, ZEMINDAR OF YETTEYA-
 POORAM ... } *Appellant,*

AND

VENCATASWARA YETTAYA ... *Respondent.**

*On appeal from the High Court of Judicature
 at Madras.*

THIS was an appeal from a decree of the High Court of *Madras*, which affirmed a decree of the Civil Court of *Tinnevelly*, awarding to the Respondent, as the illegitimate Son of the Appellant's

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Suit by
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 in his *Zenana*
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* Present:—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Wood, and the Right Hon. the Lord Justice Selwyn.

Assessor :—The Right Hon. Sir Lawrence Peel.

cognized by him as his Son, against the *Zemindar* in possession, for maintenance out of the income of the *zemindary*. The Civil Court recognized the Plaintiff's title, and directed the payment of Rs. 2,500 for mainte-

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eldest Brother, *Kumara Naicker*, a former *Zemindar*, an annual maintenance of Rs. 2,500 a year from certain villages, forming the private property of the present *Zemindar's* family.

The questions raised on the appeal were, first, whether Respondent was the illegitimate Son of *Kumara Naicker*, the former *Zemindar*? and, secondly, if so, whether he was entitled to maintenance, and the amount thereof, and out of the *zemindary*, or what other property, if any, of *Kumara Naicker*?

The circumstances of the case were these :—

The Appellant's Father, the then *Zemindar* of *Yetteyapooram*, died in the year 1840, leaving three sons, *Kumara*, *Vencataswara*, and the Appellant, *Muttusawmy*. The family is of the *Soodra* caste. The eldest Son was, on the death of his Father, installed with *pattam* of the *zemindary*.

The Respondent claimed to be an illegitimate Son of Appellant's eldest Brother, *Kumara Naicker*. The Respondent's Mother, *Avudai Jangam* was a *Dasi*, or dancing girl, formerly attached to a *Pagoda*

nance out of the private property of the late *Zemindar*. The High Court, on appeal sustained the Court's decree, but did not determine, whether the maintenance was a charge on the *zemindary*, or on the private estate of the late *Zemindar* :—Held, on appeal :—

First, that, as the Son was recognized by his natural Father, it was not essential to his title to maintenance that he should have been born in the house of his Father, or of a Concubine possessing a peculiar *status* therein ; but,

Secondly, in the absence of evidence that there was private property of the late *Zemindar* which descended to the Defendant, and of any declaration, in the decree of the High Court, that the *zemindary* was chargeable with such maintenance, the Judicial Committee remitted the cause, with a declaration of the Plaintiff's *status*, as an illegitimate Son of the late *Zemindar*, and consequent right to maintenance ; leaving it for the High Court to determine, whether the decree should be varied, by directing maintenance to be paid out of the income of the *zemindary*, or whether it should direct any further inquiry, in order to ascertain, whether there was any other property of the late *Zemindar* upon which it could be charged.

at *Kalugumalai*, within the *zemindary*. The Respondent's case was, that he was born after his Mother was taken as a Concubine into the *Zenana* of the Palace; but the Appellant contended, that when she first came into the *Zenana* of *Kumara Naicker*, she brought the Respondent, then about a year old, with her, and that the Respondent was born at *Kumulagai*, whilst his Mother was a dancing girl in the *Pogoda*. There was no question that Respondent's Mother afterwards resided in the *Zenana* at *Yetteyapooram* as the Concubine of *Kumara Naicker*.

In his lifetime *Kumara Naicker* made a *Pooroopu Manyam* grant of a village called *Pudupatti*, part of the *zemindary*, to the Respondent's Mother and her male issue, and the income of the village was enjoyed by the Respondent's Mother till the death of *Kumara Naicker*, which event took place in *May*, 1853. As *Kumara Naicker* died without legitimate issue, *Vencataswara Naicker*, his next Brother, succeeded to, and entered into possession of, the *zemindary*, when he resumed possession of the village of *Pudupatti* as part of the *zemindary*.

In consequence a suit, No. 1 of 1858, was brought by the Respondent and his Mother against *Vencataswara Naicker*, claiming the village under the *Manyam* grant, but it was decided against them, on the ground of informality of the registration. The Respondent, in that suit, described himself as the Son of the late *Zemindar*, and urged that the *Manyam* grant was valid, as being to the heirs of the *zemindary*; but the fact that the Respondent and his Mother were the heirs, was denied by the then *Zemindar*. The suit terminated by a decree of the

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Sudder Court, dated the 22nd of *September*, 1860, in favour of the Appellant, who, by the death of his Brother, *Vencataswara Naicker*, in 1859, had succeeded as *Zemindar*.

On the 7th of *September*, 1863, the Respondent brought the present suit, in the Court of the Principal *Sudder Ameen* of *Tinnevelly*, against the Appellant, claiming to be a Son of the Appellant's eldest Brother, *Kumara Naicker*, and stating that the Appellant's second Brother, the late *Zemindar*, on the death of the Respondent's Father, took possession of the ornaments, &c., worn by the Plaintiff and his Mother, as well as of the *Melaranmanai*, &c., belonging to them, and the whole of the property in it, and turned out the Plaintiff and his Mother, in 1854, and praying that a decree might be passed awarding to the Plaintiff and his heirs, on account of their maintenance, a sum of Rs. 8,400 *per annum*, at Rs. 700 a month, to be annually paid from the income of the *zemindary*.

The Appellant, by his answer, denied that the Plaintiff was the Son of his eldest Brother, stating that he was born of a dancing girl, while she was attached to the *Pagoda* of *Kalugumalai*; that the Plaintiff's Mother had obtained from the Defendant's eldest Brother property, valued at a lac of rupees, and after referring to the above suit, submitted that the Plaintiff had never before claimed maintenance, and that his claim for maintenance out of the *zemindary* was contrary to law.

Issues were framed, first, whether the Plaintiff's Mother was the permanent Concubine of the late *Zemindar*, and secondly, whether the Plaintiff was born to the late *Zemindar*, *Kumara Naicker*.

The Plaintiff examined two witnesses. The first

witness had been the *Vakeel* employed by Plaintiff's Grandmother in certain criminal proceedings instituted by her in 1854 against the late *Zemindar, Vencataswara*, the second Brother, which had ended in a compromise, effected by a *Razinamah*, in which instrument the Respondent was described as the Son of the late *Zemindar, Kumara Naicker*, and Nephew of the then *Zemindar, Vencataswara Naicker*, his paternal junior Uncle.—He was called to prove that the Respondent's Mother had been taken into the *Zenana* of *Kumara Naicker*; he spoke also of ceremonies having been performed by the *Zemindar* at the birth of the Respondent. The second witness proved, that the Plaintiff's Mother brought a child with her when the *Zemindar* took her into keeping, and that Plaintiff was that child. The documentary evidence consisted of the *Razinamah*, above mentioned, and the Order for carrying it out, wherein the Respondent was described as the natural son of the Appellant's elder Brother.

The Defendant examined five witnesses, all of whom were connected with the *Pagoda* of *Kalugumalai*, among whom were the Priest, Teacher, monegar, and a dancing girl. They stated, that the Plaintiff's Mother was a *Dasi*, or dancing girl, in the *Pagoda* till her seventeenth or eighteenth year, before she was the *Zemindar's* Concubine; that she had a male child whilst she was a dancing girl; that the child was two years old when she went to *Yetteyapooram*.

On the 11th of *November*, 1863, the Official Principal *Sudder Ameen* (*A. P. Sreenevasa*) dismissed the suit with costs. The reasons given by the Court, were that the relationship of the Plaintiff to the late *Kumara Naicker* was sought to be estab-

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lished by only one witness, whose evidence was mere hearsay, whilst the Respondent's second witness had proved, to the satisfaction of the Court, that the Plaintiff had been born before his Mother was taken as Concubine by the late *Zemindar*; that the alleged admission of the relationship by a former *Zemindar*, in the *Razinamah* in the criminal proceedings, in which the relationship was not in issue, was to be looked upon with extreme jealousy; and that, in the suit, No. 1, of 1858, the *Zemindar* had denied the heirship of the Plaintiff, and even if he had not denied it in that suit, that the *factum* of the *Manyam* grant and its legality were alone then being inquired into.

The Respondent appealed to the Civil Court of *Tinnevelly*, on the ground that his first witness's evidence was sufficient; that his relationship to the *Zemindar* had been admitted by the *Razinamah* and Order of the Magistrate, and not objected to in the pleading in the suit, No. 1, of 1858, and that it appeared from the *Manyam* grant that he was not born until after the date of that document, *i. e.*, the 25th of *December*, 1840, The Plaintiff filed further documentary proofs.

The Civil Court of *Tinnevelly* (*W. Hodgson*, Esq., Acting Civil Judge), on the 31st of *March*, 1864, reversed the decree of the Principal *Sudder Ameen*, and awarded to the Plaintiff, as the illegitimate son of *Kumara Naicker*, a maintenance of Rs. 2,500, to be paid annually by the Appellant from the villages forming the private property of the present *Zemindar's* family. The reasons given by the Civil Court were:—That the late *Vencataswara Naicker* had, in the suit, No. 1, of 1858, admitted that Respondent's Mother was the Concubine of the former *Zemindar*,

Kumara Naicker; that although the *Manyam* grant by him was to the Plaintiff's Mother for her and her male issue, it must be implied that he contemplated a provision for her male issue by himself, to the exclusion of all other Claimants; that the evidence of the Respondent's second witness was improbable, from the impossibility of a girl of ten or twelve years becoming a Mother; that the hearsay evidence of the Plaintiff's first witness was admissible and credible; that the Plaintiff was proved to have been born in *January*, 1841; that the relationship had been admitted by the *Razinamah*, in the criminal proceedings, in 1854, against *Vencataswara Naicker*; that in the suit of 1858, *Vencataswara Naicker* had not distinctly denied that the Plaintiff was the Son of *Kumara Naicker*, and, referring to the annual produce of the village comprised in the *Manyam* grant as Rs. 2,726. 1. 5., and considering the position of the present holder of the estate, as paying an annual revenue to Government of a lac of rupees, he awarded Rs. 2,500 to be paid annually to the Plaintiff by the Appellant, from the villages forming the private property of the *Zemindar's* family.

Against this decree the Appellant brought a special appeal to the High Court, assigning the following reasons:—That the Respondent had no claim for maintenance upon the Appellant; that his maintenance could not be a charge upon the estate; that the Appellant's plea that the Plaintiff's Mother had received a lac of rupees from the Plaintiff's alleged Father had not been taken into consideration by the Court; that the Respondent was only entitled to mere subsistence, and that the income awarded was, as a matter of law, excessive.

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The High Court, consisting of Mr. Justice *Frere* and Mr. Justice *Holloway*, by a decree, dated the 3rd of *January*, 1865, confirmed the decree appealed from. The reasons given by the High Court were, first, that there was no appearance of any other property than that of the *zemindary*, and that the fastening of a life-rent upon that was illegal; secondly, that the Concubine of whom the Plaintiff was born was not a Slave girl, and that the right to maintenance was confined to those born of the "*familia*" of the deceased; and, thirdly, that, in point of law, the amount awarded was excessive, and the Court held, that the judgment of the Civil Judge having indicated the possession of private property by the *Zemindar*, that objection was inapplicable, and stated that the question really was, whether this Son, not being the child of a female slave, was entitled to maintenance, and that, although it had been argued that, being the Son of a *Soodra*, he was, perhaps, entitled to the inheritance, although illegitimate, and the Court, after referring to *W. H. Macnaghten's* "*Hindu Law*," Vol. I. p. 16, came to the conclusion that, as the illegitimate Son of a *Soodra*, he was entitled to maintenance; and that, although he might have been entitled to the inheritance, on the ground that illegitimate Sons of *Soodras* were entitled to inherit, yet, having lost the inheritance, he was entitled to maintenance; and as the amount of maintenance was not a question of law, the special appeal was dismissed with costs (a).

The present Appellant presented a petition for review of judgment, under section 376 of the Civil

(a) See case reported, 2 High Court of Madras Cases, 293.

Procedure Code, which, by an Order of the High Court, dated the 27th of *March*, 1865, was refused with costs.

The Appellant did not apply to the High Court for leave to appeal to *England*, as that Court had held, that they were bound by the amount of the judgment, but presented a petition to Her Majesty in Council, praying for special leave to appeal against the decree of the Civil Court of *Tinnevelly*, dated the 31st of *March*, 1864, and of the High Court of the 3rd of *January*, 1865.

Special leave to appeal having been granted (*a*), the appeal came on for hearing.

Sir *R. Palmer*, Q.C., and Mr. *W. W. Mackeson*, Q.C., for the Appellant.

There is no evidence that the Respondent was the illegitimate Son or the heir of the late *Zemindar*, *Kumara Naicker*. Even if the fact of his being such illegitimate Son were established, he could have no right to a maintenance to be charged on the *zemindary*, which is indivisible. Neither could he claim by hereditary right, as in the case of a Son of a female slave. It is clear he could not succeed to the inheritance of his putative Father; *Chuoturya Run Murdun Syn v. Sahub Purlubad Syn* (*b*). The right to maintenance can only attach to the private property of the late *Zemindar*, and there is no proof that he possessed any private property, or that any private estate descended to the Appellant. Illegiti-

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(*b*) 7 Moore's Ind. App. Cases, 18, 49.

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mate children, not born of the "*familia*," but of a *Dasi*, or dancing girl, a woman of a caste cohabiting with different men, are not entitled to maintenance. They are not the class of illegitimate children who are said to be entitled to maintenance by reason of the Mother being the Mistress of their Father, the *Mitácshará*, c. 1, sec. XII., cl. 3; *W. H. Macnaghten's* Princ. of "Hindu Law," Vol. I. p. 18. Even if the Respondent were so entitled, the sum awarded by the Court for maintenance was excessive. It is in evidence that he and his Mother received, and were in possession of, large property from the late *Zemindar, Kumara Naicker*; which would operate as a bar to his right to maintenance. But, lastly, we submit, that the decree cannot stand, as the High Court has left untouched the question, whether the right of maintenance attaches to the *zemindary*, or whether upon the private property, if any, the Appellant succeeded to on his Brother's death.

Mr. *Field*, Q.C., and Mr. *Leith*, for the Respondent.

By the Hindoo Law the Respondent was entitled to maintenance. If he had been the issue of a slave girl he would have been entitled as heir, *W. H. Macnaghten's* "Princ. of Hindu Law," Vol. I., p. 18. It was decided by the *Zillah* Judge, that he was the illegitimate son of *Kumara Naicker*, who was a Hindoo of the *Soodra* class. It is immaterial whether his Mother, who is admitted to have been the Concubine of *Kumara Naicker*, was or was not a slave girl. There was not sufficient evidence to support the allegation, that the Respondent had been otherwise provided by his deceased Father,

Kumara Naicker, during his lifetime. [Sir James W. Colvile :—We find the second record issue in your favour ; you will confine yourself to the point, whether the charge for maintenance is to attach on the private property of the Appellant or the *zemindary* he succeeded to?] The allegation in the plaint is, that the charge is upon the income of the *zemindary*. There is no distinction in law between a *zemindary* and other property, as regards the maintenance of an illegitimate Son, the same being a charge alike on both, and we submit the Appellant succeeded as heir to *Kumara Naicker* subject to the legal charges on the *zemindary*, including, therefore, of course, the maintenance of the Respondent. The High Court was right in holding that the amount of maintenance decreed by the *Zillah* Court was not a question of law, but one of discretion, and, therefore, not such as could be the subject of a special appeal.

Their Lordships, at the conclusion of the arguments, expressed their opinion, that the decree appealed from ought to be varied, but reserved their judgment, which was now delivered by

The Right Hon. Sir JAMES W. COLVILE.

The suit out of which this appeal has arisen was brought by the Respondent, claiming to be an illegitimate Son of a former *Zemindar* of *Yetteyapooram*, against the Appellant, the present *Zemindar*, for maintenance out of the income of the *zemindary*.

The suit was brought in the Court of the Principal *Sudder Ameen* of *Tinnevely*, although that Court has no jurisdiction where the matter in dispute is of a value exceeding Rs. 10,000. The Appellant, how-

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ever, did not plead to the jurisdiction; and the parties proceeded to try the right in that Court, treating the suit as one for the sum Rs. 8,400, the amount claimed for one year's maintenance. The consequences of this procedure were, that an appeal lay from the Court of the Principal *Sudder Ameen* to the *Zillah* Judge; that the Judgment of the latter upon any issue of fact was final, in *India*, and could only be brought before the High Court at *Madras*, by special appeal, on some alleged error upon a point of law or procedure.

The issues in the cause were, first, whether the Plaintiff's Mother was in the exclusive and permanent keeping of the former *Zemindar* of *Yetteyapooram* as his Mistress; and, secondly, whether or not the Plaintiff was the illegitimate issue of the said *Zemindar* by that woman, and, as such, entitled to maintenance.

The Principal *Sudder Ameen* held, that the Plaintiff (the Respondent) had failed to prove his title, and dismissed the suit with costs. The Civil Judge, on appeal, by his decree of the 31st of *March*, 1864, determined both the above issues in the Respondent's favour, declared him entitled to maintenance at the rate of Rs. 2,500 *per annum*, and decreed that this amount should be paid annually by the Appellant "from the villages forming the private property of the present *Zemindar* (the Appellant's) family." This decree was brought by special appeal, upon grounds, some of which will be hereafter considered, before the High Court of *Madras*—which, on the 3rd of *January*, 1865, dismissed such appeal; and, on the 27th of *March* in the same year, rejected an application for review of judgment, with costs.

The Appellant, having obtained Her Majesty's special leave to appeal, has brought this appeal against the decree of the High Court and that of the *Zillah* Court of *Tinnevelly*; and all questions in the cause, whether of fact or of law, are, of course, open to him upon it.

Their Lordships, at the close of the argument for the Appellant, intimated that, in their opinion, the second issue had been properly found in favour of the Respondent. They will now state their reasons for coming to that conclusion, and, in so doing, will briefly recapitulate the facts of the case.

The Appellant's Father, the then *Zemindar* of *Yeteyapooram*, died in 1840, leaving three Sons, namely, *Kumara Naicker*, the alleged Father of the Respondent, *Vencataswara*, and the Appellant. The *zemindary*, which is impartible, descended in the first instance to *Kumara Naicker* alone; and he shortly afterwards, but certainly before the 25th of *December*, 1840, brought into his *zenana*, as his Concubine, *Avudai Jangam*, the Mother of the Respondent. She was the daughter of a *Dasi*, or *Nautch* girl, attached to a *Pagoda*, which seems to be one of the appurtenances of the *zemindary*, and if she had not then begun to follow, would no doubt, but for her introduction into the *Zemindar's zenana*, have followed, her Mother's profession, with its ordinary incident, prostitution.

On the 25th of *December*, 1840, the *Zemindar* executed in her favour an instrument which will be afterwards considered. He built her a House within the precincts of his Palace, and up to the time of his death, which took place in *May*, 1853, she continued to be his favourite Mistress. So far the parties were

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agreed; but whilst the Respondent contends that he is the Son of the *Zemindar* by *Avudai*, and born after her introduction into the *zenana*, the Appellant insists, that at that time, and when her connection with the *Zemindar* began, she had for some years been a public dancing girl attached to the *Pagoda*, and that she brought with her into the Palace the Respondent, who was then at least twelve months old, and her child by an uncertain Father.

On the death of *Kumara Naicker*, his next Brother, *Vencataswara*, succeeded to the *zemindary*. He lost little time in turning out *Avudai* and her Son; for in *November*, 1854, we find that the latter had brought a criminal charge in the Magistrate's Court against the *Zemindar* and his retainers for an alleged forcible entry, and the abstraction of jewels of considerable value. This charge ended in the *razinamah*, or instrument of compromise, and the Magistrate's Order thereon, both bearing date the 6th of *November*, 1854. In this *razinamah*, the Respondent is described as the Son of the late *Zemindar* of *Yetteyapooram*, and in the body of the instrument *Vencataswara* is spoken of as "the paternal junior Uncle of the Complainant;" and in the Magistrate's Order the fact of the Complainant being "the natural Son of the first Defendant's elder Brother" is expressly assigned as reason for admitting the compromise.

Three years after this, and in *November*, 1857, the Respondent commenced a suit for the recovery of the property which was the subject of the *Pooroopu* grant of the 25th of *December*, 1840, from which, with his Mother, he had been ejected by *Vencataswara*. In his plaint he described himself as the Son of *Kumara Naicker*, the late *Zemindar* of *Yetteyapooram*. The

answer of the *Zemindar* impeached the validity of the grant by his predecessor of a village forming part of the *zemindary*. The reply of the Respondent on this point was, in effect, that his Mother, being of parallel grade with the Wife of his Father, the *Zemindar*, he, as the illegitimate son of a *Soodra* by a *Soodra* woman, was in the class capable of inheriting the *zemindary*, and, therefore, that the grant was good. In his rejoinder, *Vencataswara* said, that "the mere allegation that the second Plaintiff was of parallel grade with the Wife, was sufficient to show that she was not a legal wife, but a woman as represented in the answer; and that no one would think the Plaintiffs were heirs to the *zemindary*." But he did not then controvert the Respondent's title by a direct denial that he was the Son of *Kumara Naicker*, the course which, though the fact was not necessarily in issue in that suit, we should have expected the *Zemindar* to take, had the case touching the Respondent's birth which is now set up by the Appellant been that which was then received by the family. The earliest assertion of that case of which there is any evidence, is to be found in the answer made in this suit by *Vencataswara* some time in or about the year 1859, to the ground of appeal filed by the Respondent on his appeal to the *Zillah* Court against the decree of the Principal *Sudder Ameen*, dismissing his claim to this village. In one paragraph of that answer it is stated, that "the records show, that the first Plaintiff was born before the second Plaintiff was kept by the late *Zemindar*, and the statement that they are blood relations is incorrect." In these proceedings, therefore, their Lordships find strong grounds for coming to the conclusion, that the Respondent, for several years after

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the death of *Kumara*, continued to be reputed, and admitted to be, the natural Son of that *Zemindar*.

The decision of the suit for the village which, in the *Zillah* Court, as well as in that of the Principal *Sudder Ameen*, and on a special appeal to the *Sudder Dewanny Adawlut*, was adverse to the Respondent, did not touch the question of his birth. It proceeded entirely on the ground, that the grant having been made without the previous consent of Government, and not having been registered in the Collector's office, was not valid as against the successor to the *zemindary*.

The final decision in the last-mentioned suit was in *September*, 1860, and the present suit was brought in *September*, 1863, against the Appellant, who, on the death of his Brother during the interval, had succeeded to the *zemindary*. The oral evidence upon the issue, whether the Respondent was the illegitimate Son of *Kumara*, was certainly not very strong on either side. But if the case of the Appellant were true, we should have expected that he, a powerful *Zemindar*, in possession of the estate, with all the family records, and influencing the *Zillah* family dependants, would have been able to produce better evidence in support of his case than that which he has produced. The testimony of the Brahmins and women attached to the *Pagoda*, seems to their Lordships to be especially unworthy of credit. It has been argued, that the non-mention of the Respondent, in the *Pooroopu* grant of the 25th of *December*, 1840, affords an inference that he was not the Son of the *Zemindar*, nor, at that time, so recognized by him. This may be true, if it be assumed that the child was then in existence ;

whilst, on the other hand, the mere fact that the Respondent is not mentioned in the deed, taken by itself, might afford an inference in support of the theory, that he was not then born. But if it be assumed that he was, as the Appellant alleges, then in existence, and known not to be the child of the *Zemindar*, it is highly improbable that the deed should have provided for her male issue generally, without, at least, postponing the Respondent to any male issue to be thereafter born to the *Zemindar*. And, again, if the deed were, as it has been argued, to have been a gift to the woman in the nature of a settlement made upon taking her from the *Pagoda* into the exclusive keeping of the *Zemindar*, there was no absolute necessity for the mention of her Son, if then in existence, whether he was or was not then the Son of the *Zemindar*. Upon the whole case their Lordships think, that the evidence for the Respondent, confirmed as it was by the *razinamah*, and other evidence of recognition by the family after the death of *Kumara*, outweighed that on the Appellant's side, and justified the finding of the *Zillah* Judge of the second issue in his favour. They are satisfied that *Kumara Naicker* in his lifetime recognized the Respondent as his Son; and they see no sufficient grounds for doubting that the Appellant was in fact his natural Son. They would have felt greater difficulty in coming, upon the evidence before them, to a conclusion upon the question, whether the Respondent was born after or before the introduction of his Mother into the *zenana*. The admission, in his reply, as to his Mother's age, is of more weight than any of the evidence to the contrary, and that is consistent with the theory of his birth, at least a year

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before she became an inmate of the *Zemindar's zenannah*; and the receipts for rent in his name, which are dated as early as *February*, 1841, also tend to support that theory. It appears, however, to their Lordships, that if it be established that the Respondent was the natural Son of this Hindoo Father, and recognized by him as such, it is not essential to his title to maintenance that he should be shown to have been born in the house of his Father, or of a Concubine possessing a peculiar *status* therein. They concur in the judgment of the High Court upon this point, against which little, if anything, has been urged at the Bar.

Their Lordships further think, that, subject to the observations hereafter to be made, the amount of maintenance awarded by the *Zillah* Judge is reasonable. And this being so, they would have recommended Her Majesty to dismiss the appeal and confirm the decree below *simpliciter*, but for the point which remains to be considered.

The decree of the *Zillah* Court directed, that the amount awarded as maintenance be paid annually to the Plaintiff (the present Respondent) by the Defendant (the present Appellant) from the villages forming the private property of the present *Zemindar's* (the Appellant's) family. The first ground of appeal insisted upon by the Counsel for the Appellant, on the special appeal to the High Court of Madras, is stated to have been, "that there was no appearance of any other property than that of the *zemindary*, and the fastening of a life-rent on that was illegal."

The High Court has sought to dispose of this objection by saying, "The fact that the judgment of the Civil Judge indicates the possession of private

property by the *Zemindar* in possession, who has inherited the whole property of the Plaintiff's Father, renders this objection, even if tenable, wholly inapplicable." And it proceeds to remark, that the question, whether maintenance in such a case could be charged on a *zemindary*, was still an open one.

The objection involved two distinct propositions. First, that there was no proof of property other than the *zemindary*; and, secondly, that the maintenance could not be charged on the *zemindary*. And the High Court has avoided the decision of the latter question, by assuming that there was a conclusive finding on the other. It may have thought, that it was bound to make that assumption by the rule which excludes questions of fact from the province of a special appeal. Their Lordships, however, are disposed to think that the question, which is more pointedly raised by the first of the points stated in the application for a review, was one which, on the strictest construction of that rule, the High Court was competent to entertain on a special appeal. But, be that as it may, their Lordships, who are not subject to the rule, are bound to see, whether that part of the decree of the *Zillah* Judge, which directed the payment of the maintenance from the villages forming the private property of the *Zemindar*, was warranted by the pleadings and evidence before him. They are of opinion that it was not. The plaintiff sought for payment of maintenance "out of the income of the *zemindary*." There is no trace in the printed record of any evidence of the existence of property other than the *zemindary*, or of the nature of such property, supposing that any does exist. It is obvious that the nature, as well as the

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existence, of any such property is a material question. The Respondent may have a right to be maintained out of private property which descended from his Father to the present *Zemindar*; yet he may have none to be maintained out of private property which the *Zemindar* has acquired in any other way.

If the decree be erroneous as it stands, there remains the question, whether it ought not to be simply varied, by directing payment of the maintenance out of the income of the *zemindary*. But the High Court has failed to determine the question whether the *zemindary* is so chargeable; and the parties have declined, in the present state of the record, to argue that question before their Lordships. In this state of things their Lordships, however unwilling to prolong this litigation, can but remit the cause to *India*, with a declaration of the Respondent's *status* as an illegitimate son of the *Zemindar, Kumara Naicker*, and of his consequent right to maintenance.

It will be for the High Court to determine, whether the decree should be varied by directing the maintenance to be paid out of the income of the *zemindary*, or whether it shall direct any further inquiry in order to ascertain whether there is any other property upon which it can be charged. If that Court shall find that it can be properly charged on the income of the *zemindary*, their Lordships are of opinion that the amount awarded by the *Zillah Judge*, having regard to the Respondent's *status*, is reasonable and ought to be decreed. But if it cannot be so charged, then, in the absence of information as to the other property on which it may be chargeable, their Lordships cannot pronounce an opinion as to

the reasonableness of its amount, and they must leave that question also to be determined by the High Court on further inquiry. They trust, however, that the Respondent's title to maintenance being now conclusively ascertained, the parties will be wise enough to settle the questions that remain open by private arrangement and without further litigation. The Order which their Lordships will humbly recommend Her Majesty to make is, to reverse the decree of the *Zillah* Court of the 31st of *March*, 1864, and the decree of the High Court of the 3rd of *January*, 1865, and in lieu thereof to declare, that the Respondent is the illegitimate Son of the former *Zemindar*, *Kumara Naicker*, and, as such, is entitled to maintenance; and to remit the cause to the High Court of *Madras*, in order that such Court may determine whether, regard being had to the above declaration, the Respondent is entitled to receive maintenance out of the income of the *zemin-dary* (in which case such maintenance is to be decreed at the rate of Rs. 2,500 *per annum*); and if not so entitled, whether he is entitled, as against the Appellant, to any and what amount of maintenance, and if so, out of what property and fund; and that for the purposes aforesaid the said High Court shall be at liberty to make and direct any further inquiry that to them may seem just. Their Lordships will give no costs of this appeal.

By an Order in Council it was ordered, that the decree of the Civil Court of *Tinnevelly*, of the 31st of *March*, 1864, and the decree of the High Court of *Madras*, of the 3rd of *January*, 1865, be, and the same were thereby respectively reversed, and in lieu

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thereof that it be declared, that the Respondent is the illegitimate son of the former *Zemindar, Kumara Naicker*, and as such is entitled to maintenance, and that the cause be remitted to the High Court of *Madras*, in order that that Court might determine whether, regard being had to the above declaration, the Respondent is entitled to receive maintenance out of the income of the *zemindary* (in which case such maintenance is to be decreed at the rate of Rs. 2,500 *per annum*); and if not so entitled, whether he is entitled, as against the Appellant, to any and what amount of maintenance, and if so, out of what property and fund; and for the purposes aforesaid the said High Court is to be at liberty to make and direct any further inquiry that to them may seem just.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

RAJAH BURODACANT ROY ... *Appellant* ;

AND

THE COMMISSIONER OF THE SOON-
DERBUNS ... } *Respondent.**

On appeal from the High Court of Judicature at Calcutta.

THIS was an appeal against the decision (No. 192 of 1860) of the High Court, consisting of Messrs. *J. V. Bayley* and *J. Campbell*, which reversed a decree of the Judge of *Jessore* (Mr. *S. W. Seton-Karr*),

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer).

Assessor :—The Right Hon. Sir Lawrence Peel.

sec. 13, of *Ben. Reg.* III. of 1828, with respect to the boundaries of the *Soonderbuns*.

Where boundaries have been determined by the Commissioner under that Regulation, and no appeal therefrom made to the Special Commissioner within three months, such determination is a bar to a suit seeking to open the question of boundaries.

In a question of disputed boundaries, as to the line of demarcation

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The *Soon-derbuns* were not included in the Perpetual Settlement, but remained the property of Government.

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passed in favour of a claim preferred by the Appellant to recover possession of 83,277 *beegahs* of land and *wasilat* thereof, estimated at Rs. 93,030, as forming part of the Appellant's permanently rent-paying and decennially settled *mouzahs*, *Tildangah* and *Kumarkhola*, part of his settled *Zemindary*, *Pergunnah Sahosh* (not situated within the *Soonderbuns*), and to set aside a proceeding of the Commissioner of the *Soonderbuns*, dated the 16th of *December*, 1856, and two *dowls* and *kabooleats*, or agreements, entered into by the Appellant with Government for the payment of revenue for those *mouzahs*.

The points in dispute were, first the extent of the two *mouzahs* or *chucks*, *Tildangah* and *Kumarkhola*, and whether they included the whole of the lands bounded on the north by the *Bhuddur* River, on the west by the *Badoorgatcha* and *Sheebshaha* Rivers, on the east by the *Bhuddur* River and the *Pashur* and *Talashur* Rivers, and on the south by the *Sheebshaha* River, or whether any, and if so what portion of these lands was included within the limits of the *Soonderbuns*, and, second, whether the Appellant's right was barred by a proceeding of Mr. Commissioner *Dampier* recorded on the 9th of *February*, 1829, by which the boundaries of the *Soonderbuns* were alleged to have been finally fixed so as to include those two *mouzahs*. The land in dispute was divided by the *Dakkee* River, which as alleged by the Appellant, formed the boundary between the two *mouzahs*, and by the Respondent, to divide Lot 221 of the *Soonderbuns* from Lot 224.

between the permanently assessed *mouzahs* of a neighbouring *Zemindar* adjoining upon the *Soonderbuns*, the *Zemindar* having taken a lease from Government of part of the lands as within the limits of the *Soonderbuns*, but afterwards claimed by him as part of his *mouzahs*, the *onus* is upon him to identify the lands so claimed as not forming part of the *Soonderbuns*.

The facts of the case are fully stated in the judgment.

Mr. *Field*, Q.C., and Mr. *Cave*, for the Appellant,
and,

Mr. *Forsyth*, Q.C., and Mr. *Merivale*, for the
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For the Appellant it was contended, first, that the lands in dispute were included in the Appellant's *Pergunnah Sahosh* and were not within the limits of the *Soonderbuns*, and secondly, that the proceeding of Mr. *Dampier* was invalid, and not binding on the Appellant. They referred to and commented on *Ben. Reg. III. of 1828, sec. 13, cl. 2.*

On the part of the Respondent, it was insisted, that the disputed lands were not part of the permanently settled lands of *mouzahs Tildangah* and *Kumar-khola* in *Pergunnah Sahosh*, but formed part of the *Soonderbuns*, and that as the Appellant had not objected to the line of demarcation made by Mr. *Dampier*, within three months, the time limited, his claim was barred by *Ben. Reg. III. of 1828, sec. 13, cl. 2.* They also relied on *Ben. Reg. II. of 1819, sec. 30, cl. 9.*

Their Lordships reserved judgment, and having heard another appeal between the same parties, respecting the Appellant's right to another portion of land, claimed by the Respondent as part of the *Soonderbuns* (a), now delivered their opinion by

The Right Hon. Sir JAMES W. COLVILE.

The Appellant in this case (the Plaintiff in the

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(a) Post, p. 242.

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suit) is the *Rajah* of *Jessore*. The Respondent is the Commissioner of the *Soonderbuns*, representing the Government of *Bengal*. The real object of the suit is to obtain a judicial declaration that the lands, which are the subject of it, form part of *Pergunnah Sahosh*, the revenue on which was permanently assessed at the Decennial Settlement with the Appellant's ancestor; and, on that ground, to set aside certain instruments which have been executed by or on behalf of the Appellant to Government for the payment of the revenue lately assessed on the same lands, on the assumption that they were not part of his settled estate; and to recover back the payments which have been made to Government under that engagement.

The persons who are in actual possession of the lands are not parties to the suit, which is erroneously stated to be one for the recovery of possession, an error which has led to some confusion in the argument. The true nature of the suit is shown by the issues which have been settled in it. These were,—

First, whether the boundaries of Lots No. 221 and 224, fixed by Mr. *Dampier*, the former Commissioner of the *Soonderbuns* in 1829, in accordance with rule not having been set aside up to this date by any Court, and the Plaintiff not having filed objections in reference to such boundaries for thirty-one years, his claim was barred by cl. 2, sec. 13, of Reg. III. of 1828.

Second, whether the land claimed formed part of the decennially settled *Pergunnah Sahosh*, or the right of Government as being part of the *Soonderbuns*, and, whether the Plaintiff's former proprietor had ever been in possession of the land.

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Third, when the disputed land with its boundaries had been released from the claims of Government, on proof of its being rent-paying or *mal* land, and subsequently by means of survey, *Dowl* was unjustly taken for it on the allegation, that it was the right of the *Soonderbuns*, whether the Plaintiff is entitled to have the *Dowl* set aside, and obtain possession of the land, as his *mal* right, together with *wasilat*.

The history of the *Pergunnah Sahosh* is briefly this. After the Perpetual Settlement, the then *Rajah*, the Appellant's Grandfather, mortgaged it to one *Bissoonath Bose*. He is said fraudulently to have allowed the revenue to fall in arrear, and to have purchased the estate when put up for sale by Government *benamee* some time in 1804. This transaction was afterwards impeached, and the Government (we must assume regularly) declared the estate to be forfeited; but in the year 1825 regranted it to the Appellant, then an infant. It is alleged, and not disputed, that the effect of this regrant was to remit the Appellant to the precise rights of his ancestor under the Perpetual Settlement. The estate between 1825 and the date at which the Appellant attained his majority was administered by the Collector and other revenue Officers acting as the Court of Wards; but their acts are material only as bearing upon one or other of the issues in the suit, and particularly upon that which affirms that the lands in question formed part of *Pergunnah Sahosh* in 1792.

This *Pergunnah*, whatever were its precise boundaries, unquestionably abutted upon, and, at least on one side of it, was bounded by that large tract of waste and jungle land which forms the seaboard of the delta of the *Ganges*, and is known as the *Soon-*

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derbuns. And it is certain that the *Soonderbuns*, whatever were then their precise limits, were neither included, nor intended to be included, in the Decennial Settlement of 1792, but remained the property of Government as the general owners of the soil.

From the *Quinquennial* Register of 1795, it appears that two of the component parts of *Pergunnah Sahosh* were the *mouzahs* or *chucks* of *Tildangah* and *Kumarkhola*. There is, however, no evidence to show what the areas of these *mouzahs*, when settled, were. They were situated at two of the points at which *Pergunnah Sahosh* touched the *Soonderbuns*. And the broad question of fact between the parties is, whether these settled *mouzahs* or *chucks* comprehended the whole of the areas marked Lots 221 and 224 in the coloured map which is part of the record, or whether they were limited to the two smaller areas which are coloured yellow, and lie within those lots or in immediate juxtaposition to them.

In 1828 the *Bengal* Government appears to have been active in taking measures for extending cultivation in the *Soonderbuns*, and for ascertaining and asserting the rights of the State therein. As a step thereto, it determined to fix and lay down the boundaries of that tract of unsettled land; and for that purpose (amongst others) Regulation III. of 1828, the effect of which will be afterwards considered, was passed. In 1829, Mr. *Dampier*, the then Commissioner of the *Soonderbuns*, under the 13th section of that Regulation, proceeded to fix and lay down the boundaries of the *Soonderbuns* in the immediate neighbourhood of *Tildangah* and *Kumarkhola*. His proceeding and the Map, called "Captain

Hodge's Map," was made pursuant to the Regulation, in accordance with that proceeding. The boundary line, as defined by Mr. *Dampier's* proceeding, seems to have included within the limits of the *Soonderbuns* the whole of Lots 221 and 224, together with the two areas marked yellow on the coloured Map, which have before been mentioned; or, in other words, all the land now in question, and also the lands represented by those two coloured portions of the map, and now admitted to belong to the settled *mouzahs* of *Tildangah* and *Kumarkhola*.

At the time of Mr. *Dampier's* survey, certain proceedings were pending between the Government and the *Rajah*, or his guardians on his behalf, which must now be considered.

There is some trace of a claim on the part of Government as early as 1812, but the proceedings in question were not actually commenced until the 12th of *November*, 1825, when the Collector of *Jessore* instituted a suit under Regulation II. of 1819, as amended by Regulation IX. of 1825, for the assessment of revenue upon 8,000 *beegahs* of land. The ground of his claim was, that this parcel of land, though in possession of *Rajah Burodacant Roy*, under the names of *chucks*, *Tildangah* and *Kumarkhola*, was, in fact, part of the *Soonderbuns*, and, as such, subject to the claim of Government. This suit was in the first instance defended (the *Rajah* being then a minor) by the *Surbarakur* appointed by the Court of Wards, and was, therefore, in this peculiar condition, that the Plaintiff was the Collector asserting the proprietary or fiscal rights of Government, and the Defendant was an Officer appointed by that same Collector acting as a Court of

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Wards. And this may be one reason why for some years the suit appears to have been conducted very languidly. In 1829 Mr. *Dampier* fixed his boundary line, which included the lands in dispute with the other lands in that locality within the limits of the *Soonderbuns*. Some proceedings in this pending suit seem afterwards to have been had before him as Commissioner of the *Soonderbuns*; but the suit was not decided until *November*, 1834, when the then Commissioner, Mr. *Grant*, gave judgment in favour of Government.

His decision was grounded partly upon Mr. *Dampier's* map, partly on the absence of proof on the part of the *Rajah* that the lands formed part of his settled estate; and it seems to have treated the whole of *chucks*, *Tildangah* and *Kumarkhola* as "newly-cultivated lands of the *Soonderbuns'* jungle." From this decision the *Surbarakur* appealed. A new trial was directed. The case was then tried by Mr. *Kemp*, whose decision, on the 20th of *September*, 1839, was to the effect, that the 8,000 *beegahs* were lands belonging to *chucks*, *Tildangah* and *Komarkhola*, which formed part of the *Rajah's zemindary* of *Pergunnah Sahosh*, and that the Government had no right to assess them. This decision was, on the 19th of *August*, 1842, confirmed on appeal by the Special Commissioner, Mr. *D'Oyley*, who, however, intimated a doubt, whether some portion of the land in question might not have been acquired from the *Soonderbuns* by gradual encroachment, and added to the settled *mouzahs*.

The so-called 8,000 *beegahs* appear to have been, according to ordinary measurement, 12,000, and in the course of the argument there was much dis-

cussion as to their precise locality. Mr. *Field* insisted, that they were situated at the southern extremity of Lot 224. But from the proceedings which will be next mentioned, and other evidence in the cause, their Lordships are satisfied that, of the 12,000 *beegahs*, 6,476 form the whole or part of the two before-mentioned yellow areas in the coloured Map which are now admitted to represent the settled *mouzahs* of *Tildangah* and *Kumarkhola*; and that the remaining 5,524 *beegahs* were probably contiguous to them.

From the proceedings stated in the record their Lordships gather the following facts :—

Some time between the years 1849 and 1851, Mr. *Smith*, a Deputy Collector deputed for that purpose, made a survey of Lots 221 and 224, and a Settlement of part of them. His instructions were to leave out the land which had been released by the decision of Mr. *Kemp*; to specify and define the other land belonging to the two Lots on which the claim of Government attached; and to bring it under assessment. He seems to have satisfied himself that within the admitted boundaries of *Tildangah* there were 3,193, 12, 3 *beegahs*, and within the admitted boundaries of *Kumarkhola* 3,282, 7, 2 *beegahs* of land; and it is impossible to read the proceeding of the Revenue Commissioner, of the 13th of *August*, 1853, at pages 49 and 50 in the Record, without coming to the conclusion, that these 6,476 *beegahs* have been exempted from the Government claim, and are now held by the Appellant as part of *mouzahs*, *Tildangah* and *Kumarkhola*, within his settled *zemin-dary* of *Pergunnah Sahosh*. As to the remaining 5,524 *beegahs*, there is considerable confusion. It

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appears that Mr. *Smith* took two parcels of land aggregating that number of *beegahs* from Lots 221 and 224, in order to make up the 12,000 *beegahs*, the whole of which he could not find within what, according to his view, were the boundaries of the *zemindary*. But from the statement of his proceedings on the 16th of *December*, 1856, it would seem that, after excepting and setting a part the 6,476 *beegahs*, he found that Lot 221 consisted of 26,277. 13, 4 *beegahs*, of which 14,679, 16, 12 *beegahs* were cultivated and 11,597, 16, 4 were jungle; and that Lot 224 consisted of 57,000 *beegahs*, of which 14,119, 12, 4 were cultivated and 42,880, 7, 12 *beegahs* were jungle; and that after deducting the last-mentioned quantity of jungle, which he left unsettled, he made a settlement for Lot 221 with *Ramrutton Roy* and another, as the representatives of one *Brijokissore Roy*, and a settlement for the cultivated lands in Lot 224 with one *Nobokant Roy*. These parties were in occupation of the lands in question under *Jungleboore Pottahs*, which had been granted by the Court of Wards during the minority of the *Rajah* on his behalf.

The *Rajah* appealed against these settlements, insisting that the lands so settled were part of his settled *zemindary*, *Pergunnah Sahosh*. The Government threatened resumption proceedings, but gave the *Rajah* the option of settling for the lands on favourable terms. Those terms were ultimately accepted; a settlement was made with him for both Lots, 221 and 224, for ninety-nine years, and he signed by his *Mooktar* the usual *Dowls* and *Ikrahnama*hs on the 26th of *November*, 1856. These are the instruments which the present suit is brought to set

aside. One term in the arrangement was, that he should respect the possession and rights of the *Pottahdars*, in the proceedings called *Gantidars*, viz., *Nobokant Roy* and the representatives of *Brijokissore Roy*.

From the above facts their Lordships have come to the conclusion, that these settlements included the 5,524 *beegahs*, part of the 12,000 *beegahs* which had been released, by Mr. *Kemp's* decision, from the claims of Government ; but that they did not include the 6,476 *beegahs*.

This settlement with the Appellant was complicated by the fact, that settlements had previously been made with the *Gantidars* as occupiers at less favourable rates ; and part of the arrangement contemplated was, that the Appellant should receive from them the revenue assessed on them, paying that for which he was liable under the *Dowls*, and retaining the difference. The representatives of *Brijokissore Roy* afterwards resisted this arrangement ; and in a suit between them and the Appellant, the Judge held, that he could not enforce his claim against them, and made observations on the settlements which probably led to the institution of the present suit.

The result, however, of the last-mentioned litigation can have no effect on the determination of the present suit. The Appellant is not seeking to be relieved from the settlement because it cannot be carried out as contemplated ; nor does he sue for the performance of any agreement that may have been made. He seeks to avoid the settlement on the broad ground, that the whole of the lands included in it are part of the settled *zemindary* of *Pergunnah Sahosh*.

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The *Zillah* Judge has held, that this contention is well founded, and has decided in favour of the Appellant. The High Court, proceeding entirely on the consideration that the Appellant is, by force of Regulation III. of 1828, bound by Mr. *Dampier's* demarcation of the boundary line of the *Soonderbuns*, has dismissed his suit.

The first question which their Lordships will consider is, what is the effect upon the present suit of Regulation III. of 1828, sec. 13, and the demarcation thereunder of Mr. *Dampier's* boundary line?

The Regulation was passed, as the preamble declares, with the double object of appointing Special Commissioners, whose judgment should be final in resumption suits, and of amending the procedure furnished by Regulations II. of 1819, and IX. of 1825, in such suits; and of making provision for the immediate settlement of the limits of the *Soonderbuns* as ascertained by careful local inquiry conducted by the Commissioner specially appointed to the duty, and the Surveyors under his authority. The latter object is dealt with by the 13th section.

The first clause of the section declares, that "The uninhabited tract known by the name of the *Soonderbuns* has ever been, and is hereby declared still to be the property of the State: the same not having been alienated or assigned to *Zemindars*, or included in any way in the arrangements of the Perpetual Settlement." It then affirms the right of Government to make grants and leases of any part of the *Soonderbuns*, and to provide for the clearance and cultivation of the tract; and provides, that if any *Zemindar* or other person owning and occupying, or collecting, the rent or

revenue of cultivated land in the neighbourhood of the land so granted, shall bring a suit to contest the validity of the grant, his suit shall be dismissed on proof that the land so granted is or was when the grant was made within the limit of the unoccupied jungle so named and described. And then it provides for compensation to persons who may have acquired certain rights in respect of gathering wax, cutting wood, or obtaining other jungle products.

The second clause enacts, "That the boundary of the *Soonderbuns* jungle shall be laid down by accurate survey, as determined on the spot by the Commissioner of the *Soonderbuns*;" it next makes provision for enabling any *Zemindar* or party interested to obtain a copy of the survey map, with the boundary marked thereon, together with a copy of the Commissioners' proceedings on the subject; and it then proceeds in these words:—

"Any party deeming his right injured by the demarcation so laid down, shall be at liberty, at any time within three months from the date of the Commissioners proceeding fixing the same (which proceeding shall always be held and published on the spot), to contest the same by petition to a special Commissioner under this Regulation, having local jurisdiction for the time being (or if no such jurisdiction exist, to the ordinary Courts of Justice, by which the case is cognizable) praying further investigation; provided that no plea of objection against the line of demarcation laid down shall be heard or admitted, excepting only such as shall declare and offer proof that at the time of survey a specific quantity of land, or land with defined limits, was in the occupation of the Petitioner cleared and under

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cultivation, which, by the line of demarcation adopted, is placed within the *Soonderbuns* tract belonging to Government. Every such application so made shall be regarded as a claim to hold the tract claimed free of the public assessment, and shall be investigated and decided under the rules of Regulation II. of 1819, as modified by this Regulation."

The first thing that strikes the mind on reading these enactments is, that as the object of passing them was to make provision for the immediate settlement of the limits of the *Soonderbuns*, so that object could only be attained by fixing peremptorily a period at which the demarcation of those limits should be final. The object would be defeated if any person could come in after that period, pleading infancy or other ground for reopening the question of boundary, since the geographical boundary line was necessarily to be one and the same for all the world. Another inference to be drawn from these provisions is, that the line of demarcation so drawn was to be final and conclusive, at least in respect of all waste lands and uncleared jungle. The Petitioner could not be heard to object to the line unless he declared and offered proof that, at the time of the survey, he was in the occupation of a definite quantity of land cleared and under cultivation within the line. Nor was this unreasonable. The presumption which might arise in other parts of *India*, that jungle was within the limits of a settled *zemindary*, would not arise in the case of a *zemindary* bounded by the *Soonderbuns*. For that tract of land was advisedly excluded from the Perpetual Settlement; and, therefore, the presumption would be, that the settlement in that locality was confined to the land then in cultivation. A person

in occupation of cultivated land might, within three months, do two distinct things: he might pray for a further investigation, which might result in a new demarcation of the boundary; and he might put forward his claim to hold the particular lands free from public assessment, which would lead to a judicial investigation of his title.

But as the line defines the tract called the *Soonderbuns*, and the *Soonderbuns* are declared to be *extra* the Perpetual Settlement, it is difficult to see how, after the line had, on the expiration of the three months, become final, any party could be heard to say that even cultivated lands within it were part of his settled *zemindary*. Upon the whole, therefore, their Lordships are disposed to agree with the High Court in the conclusion, that the Regulation was a bar to the Appellant's suit. The decision, with respect to the 12,000 *beegahs*, does not necessarily conflict with this view of the Appellant's rights; "and the judgment in this case will leave that decision and its practical effect untouched." That suit was pending before the Commissioner when he drew his boundary line; and the mere pendency of the suit took it out of the operation of the Act, so far at least as it was a claim to hold the lands free from further assessment. There was no application within the proper time for a rectification of the boundary line.

Let it be assumed, however, for the sake of argument, that the Regulation is not an answer to this suit. Their Lordships would, nevertheless, be of opinion, that the Appellant has failed to make out his case, or to establish the second of the issues settled in the suit.

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He comes into Court under a very heavy burthen of proof. He comes to set aside settlements made with a full knowledge of the facts, without fraud, and by way of compromise of a disputed right. The boundary line of Mr. *Dampier* has at least settled the general outline of the *Soonderbuns*, and shows that if the Appellant's case be true, his *zemindary* must have made a very extraordinary indentation into that tract of country. The decision as to the 12,000 *beegahs* is final as to them, but as to nothing more; and even as to part of them the Special Commissioner expressed a doubt, whether they had not been gained by encroachment on the *Soonderbuns*. The Appellant is claiming not only cultivated land, but many thousand *beegahs* of jungle, in the face of the strong presumption that jungle in that locality was not included in the settlement of his *zemindary*.

To these presumptions what evidence has he to oppose? Certain vague admissions of his title made by one Collector in 1805 and 1807, and by another Collector in 1812 (the latter only being in a suit), upon the application of a third party for the *Pottah* of some lands, of which the precise position is not accurately determined, and which (if any) were at most but a very small part of the lands now in dispute. Besides these there is the *Tummabundee* of 1826, which, at first sight, is a more important piece of evidence. But of that document it is to be observed that, even if it goes the length of supporting the Appellant's present case to its full extent (which, as regards Lot 221, it hardly does), it was prepared by the Court of Wards in the interest of its minor ward; and that its value as an admission by a Government Officer is destroyed by the fact, that more than a year

before the date (26th of *December*, 1826) which it bears, Government had commenced the suit for the resumption of the 12,000 *beegahs*, which included even the lands now admitted to belong to the settled *mouzahs*. Their Lordships, therefore, think that the *Zillah* Court was wrong in holding, that the Appellant had proved, as matter of fact, that the lands in question were part of his settled estate.

Mr. *Field* has, however, contended, that he is, at least, entitled to succeed as to the 5,524 *beegahs*. Their Lordships, as they have before stated, believe them to be included in the settlement; and they consider that, rightly or wrongly, this parcel of land has been finally decided to be part of the settled *zemindary*. They conceive, however, that no decree can be made respecting it in this suit. The settlement in which it is included, was entered into which full knowledge that it was so included, and by way of compromise. It may be that its inclusion in the settlement was part of the compromise, and a consideration for more favourable terms of settlement. For these reasons, their Lordships think, that it is impossible to give in this suit any particular relief concerning it. Upon the whole, then, their Lordships have come to the conclusion, that the decree of the High Court dismissing the Appellant's suit should be affirmed; and they will humbly recommend Her Majesty to dismiss this appeal with costs.

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RAJAH BURODACANT ROY ... *Appellant* ;

AND

THE COMMISSIONER OF THE SOON-
DERBUNS ... } *Respondent.**

On appeal from the High Court of Judicature at Calcutta.

17th Dec.,
1868.

Decree of
the High
Court de-
fining boun-
daries of land,
as forming
part of the
Soonderbuns
for revenue
assessment,
reversed on
appeal,

THIS was another appeal between the same parties, brought also from a decision of the High Court (No. 47 of 1859), which reversed the decree of the Judge of *Jessore*, in favour of a claim preferred by the Appellant, for confirming his possession, by declaration of *mal* right, in 8,933 *beegahs* of land, and for removing an attachment, by setting aside an Order of the Revenue Commissioner of the *Nuddea District*, for assessment of revenue.

The point in dispute was, whether the Appellant was entitled to the lands in question, known as the *chucks*, *Magoorah Delutter*, and *Jeerbooniah* comprised in *chuck*, *Delutter*, as forming part of his *Zemindary*, *Pergunnah Sahosh*, or whether the Government was entitled to them, as comprised in and falling within the limits of the *Soonderbuns*.

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer).

Assessor :—The Right Hon. Sir Lawrence Peel.

After the case had been opened by

Mr. *Field*, Q.C. (with whom was Mr. *Cave*),

Mr. *Forsyth*, Q.C. (with whom was Mr. *Merivale*)

Intimated to their Lordships, that they could not, on the part of the Respondent, maintain the judgment of the High Court.

The Right Hon. Lord CHELMSFORD.

We think that nothing can be more fair and honourable than the course which the Counsel for the Respondent have thought proper to adopt. It is undoubtedly the duty of Counsel, as long as any reasonable doubt exists upon which they may ask for the judgment of the Court, to maintain the cause of their Client; but when they feel no doubt, and when it is perfectly clear, that there can be but one judgment in the matter, and more especially when the case cannot be maintained, except by imputing fraud or the want of fair dealing towards another party, Counsel are bound to withdraw from the case. Under these circumstances, their Lordships can have but one course to adopt, which is to reverse the judgment of the Court below in this case, and to allow the appeal.

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MUSSUMAT RANEE SURNO MOYEE ... *Appellant* ;

AND

SHOOSHEE MOKHEE BURMONIA and } *Respondents.**
 others }

*On appeal from the High Court of Judicature at
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17th Dec.,
 1868.

An auction
 sale, under
Ben. Reg.
VIII. of
 1819, of the
 rights of *Put-*
needars in a
Putneetalook,
 by the *Zemin-*
dar for arrears
 of rent,
 was set aside
 by the *Zillah*
 Court for
 informality
 in the no-
 tices under
 that Regula-
 tion, and the
Putneedars,

IN this case the appeal was brought against a decision of the High Court at *Calcutta*, reversing a decree of the Deputy Collector of *Zillah Nuddea*, passed in favour of the Appellant, under the following circumstances :—

On the 10th of *Shrabun*, 1251 (*July*, 1844), *Rajah Krishto Nauth Roy, Bahadoor*, the Husband of the Appellant, who was the then *Zemindar* of

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer).

Assessor :—The Right Hon. Sir Lawrence Peel.


who had been dispossessed, restored, with mesne profits to be paid by the Purchaser, during the time they were out of possession. The *Zemindar* then brought a suit against the *Putneedars* under Act, No. X. of 1859, to recover the arrears of rent which had accrued before and during the time they were out of possession. The High Court decided that the suit, not being brought within three years from the time the rent first became due, was barred by section 32 of Act, No. X. of 1859. Such finding reversed on appeal; the Judicial Committee holding, that the cause of action accrued at the date of the decree reversing the auction sale, and that the suit having been brought within three years from the date of that decree, the time had not by Act, No. XIV. of 1859, run out.

Pergunnah Plassey, in the *Zillah* of *Nuddea*, made a *putnee* settlement with *Kashub Chunder Roy*, by which the latter agreed to take the *Zemindary* of the *Rajah*, under the provisions of *Ben. Reg. VIII.*, of 1819, at a yearly *jumma* of Rs. 51,500.

After the making of this agreement and before the year 1857, *Rajah Krishto Nauth Roy* died, leaving his Widow, the Appellant, his heir.

In the month of *Cheyte*, 1264 (*March*, 1858), there was due to the Appellant a balance of Rs. 3,125 in respect of the rent from *Bysack* to *Assin*; and a further sum of Rs. 31,500 for arrears of rent for the succeeding half-year from *Kartick* to *Cheyte*, and Rs. 1,130. 15a. 2p. for interest, making together the sum of Rs. 35,755. 15a. 2p.; and she took proceedings to recover that amount by instituting a suit under *Ben. Reg. No. VIII.* of 1819, against the Respondents, who claimed to be entitled to the *Putnee talook* in various shares, under the settlement made with *Kashub Chunder Roy*, in the year 1844, and ultimately their estate and interest was put up for sale by auction, in *June*, 1858, and purchased by one *Tarinnypershad Ghose*, at the price of Rs. 60,000, out of which the Appellant's claim for rent in arrear, and interest thereon, amounting to Rs. 36,021. 7a. 7p., was paid, and the balance deposited in the Collector's Treasury.

Afterwards, on the 5th of *February*, 1859, *Jud-doonath Roy*, *Sreenauth Roy*, *Seetonath Roy*, and *Adeetonauth Roy*, the heirs and Sons of *Chundromohun Roy*, *Tara Soondree Burmonea*, the guardian and Mother of *Mrigandronauth Roy*, a minor, and *Behary Lall Roy*, on his own behalf, and as the guardian of *Aushinee Koomar Roy* and

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Kaminee Koomar Roy, minors, instituted a suit in the Civil Court of *Nuddea*, against the Appellant, her Agent, the auction Purchaser, and the other co-sharers praying for the cancellation of the auction sale and for the recovery of their share of the *Putnee talook*, on the ground of various irregularities which they alleged had occurred in the sale and in the proceedings previous thereto. The case was decided by the *Zillah* Judge, on the 26th of *December*, 1860. when the sale was cancelled; and it was ordered, that a return of the purchase-money, with interest, should be made to the Purchaser, and that the Plaintiffs should recover the mesne profits from the auction Purchaser and be put in possession, on the ground that the notices of the sale required by cl. 2, of sec. 8, of *Ben. Reg. No. VIII.* of 1819, to be served on each of the Tenants had not been proved to have been served on the Plaintiffs. The Appellant appealed to the High Court at *Calcutta*, when, on the 30th of *June*, 1863, the judgment of the *Zillah* Judge was upheld, and it was ordered, that the auction Purchaser should receive back the amount of the purchase-money, with interest.

In consequence, the Appellant had to return the purchase-money to the auction Purchaser, who, in his turn, was ordered to pay the whole of the mesne profits to the *Putneedars* without any deduction, so that the Appellant was left without any means of satisfying the arrears of rent and interest due from them to her, and which had been temporarily satisfied by the proceeds of the sale. She, therefore, instituted a suit, on the 5th of *October*, 1863, by filing a plaint in the Court of the Deputy Collector of *Zillah Nuddea*, under Act, No. X. of 1859, for the pur-

pose of obtaining payment of the arrears of rent due to her for the year 1857-1858, together with interest, amounting together to Rs. 58,493. oa. 6p., and further interest until the date of payment.

On the 8th of *December*, 1863, the Defendant, *Shooshee Mokhee Burmonia*, one of the Respondents, filed a written statement in which, without disputing the fact that the arrears sued for were unpaid, she contended, first, that, the Appellant's claim was barred by section 32 of Act, No. X. of 1859, and that the suit ought to have been brought under *Ben. Reg. VIII.* of 1819, sec. 17, cl. 3, and not under Act, No. X. of 1859; secondly, that when the sale was set aside no express Order was made for institution of a suit for the arrears of rent; and thirdly, that at all events, the Plaintiff was not entitled to interest. Similar written statements were filed by the other Defendants, *Juddoonath Roy*, *Sreenauth Roy*, *Seetonath Roy*, *Adeetonauth Roy*, *Tara Soondree Burmonia*, and *Beroja Moyee Burmonia*, and by *Ishun Chunder Roy*, *Bunmallee Roy*, and *Trinmallee Roy*, and also by *Kisto Nauth Roy*, who stated, that he was a minor at the time, and that his share, having been attached by Orders of the Court, was under the management of the Collector, who offered to pay the Appellant his share of the rents, for which reason he contended that he was not liable to the Appellant's claim for interest on the arrears.

The suit was heard on the 22nd of *December*, 1863, by the Deputy-Collector (Mr. *H. L. Harrison*), who held, that the Appellant was not barred by the law of limitation, inasmuch as she could not both take the rents and sell the *Putnee talook*; that so

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long as she was engaged in lawfully defending a suit to reverse the sale, she could not possibly sue for the rent, and, therefore, that the cause of action did not accrue until the 26th of *December*, 1860, the date of the decision of the *Zillah* Judge, in which case, being within three years, the suit was in time. The Deputy-Collector also decided, that the suit was properly brought under Act, No. X. of 1859, and that the Appellant was entitled to interest upon the arrears, not only in the case of the other Defendants but also in that of *Kisto Nauth Roy*, on the ground, as to the last-named Defendant, that the tender made by the Collector was not such as the Appellant was bound to accept, and he decreed for the full amount claimed.

From this decree, *Shooshee Mokhee Burmonia* and *Kisto Nauth Roy* appealed to the High Court of *Calcutta*, and their appeal was heard on the 19th of *August*, 1864, before Messrs. *Bayley* and *Phear*, two of the Judges of that Court, when the decision of the Deputy-Collector was reversed, on the ground, that the Appellant's claim was barred by section 32 of Act, No. X. of 1859. The material part of the judgment upon this point was in these terms:—
“The substantial ground of appeal to this Court, is upon the question as to the limitation of time for bringing the suit. The Plaintiff urged, firstly, that the arrears were put in abeyance by satisfaction out of the proceeds of the irregular sale, and revived, or rather became a second time due, when the High Court in 1863, finally declared the sale to have been illegal, and decreed restitution of the purchase-money, with costs. This ground of contention is untenable, otherwise the Plaintiff would be enabled to take advantage of her own wrong. She committed

a trespass in bringing to sale that property with a defective notice, when it was her duty, in law, to have that notice duly served, and cannot now be heard to say that that trespass prevented her from running against her right of action. Secondly, she maintains that, at any rate, her cause of action was subsisting at the time of the passing of the Act, No. X. of 1859; and that as she was unable, on account of the pending litigation, above-mentioned, to sue during the first portion of the three years prescribed by that Act for causes of action; so situated, she is entitled to deduct from the computation of those three years—at least so much of the time as intervened between the passing of that Act and the decree of the High Court on 26th of *June*, 1863. On this we must observe, that the words of section 32 of that Act are absolute, and, unlike those of similar Acts, do not either expressly or by implication admit of any exception whatever to their operation. It was urged, that the exceptions to the limitation in Act, No. XIV. of 1859, may be applied by analogy. But this is not so, for section 32 of Act, No. X. of 1859, is a special Statute of limitation of itself for all cases coming under that Act. Moreover, it is not correct to say, that this suit could not have been brought, pending the litigation respecting the irregular and invalid sale; and here again she cannot claim any benefit from acts of her own, which she ought from the beginning to have known were illegal or defective, or she could at any time have sued and abided the result, so saving her time. The appeal must be upheld, on the ground that the Plaintiff's suit was barred by section 32 of Act, No. X. of 1859."

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The appeal was from this decree.

The Respondents having put in no appearance, the case was heard *ex parte*.

Mr. *Cave* (Sir *R. Palmer*, Q.C., with him) for the Appellant.

The tenure known in *India* by the name of *Putnee*, or *Patni*, is one by which the Occupant holds of a *Zemindar*, under a *Pottah*, or lease, a portion of the *Zemindary* in perpetuity, or for a fixed term, with or without the right of hereditary succession, and of letting or selling the whole or part as limited by the *Pottah*; as long as a stipulated amount of rent is paid to the *Zemindar*, who has the power of sale for arrears of rent. In consequence of the sale for the arrears due by the *Putneedars* being set aside, the Appellant had to return the purchase-money to the Purchaser, and the mesne profits were received by the *Putneedars* from the Purchaser. As the arrears still continued due, the Appellant as *Zemindar* was not affected by the provisions of section 32, of the Act, No. X. of 1859, which does not, so far as the point of limitation of suits arises, apply to the case. The Act applicable, is No. XIV. of 1859, sections 7 and 14, which is to be construed by *Ben. Reg.* III. of 1793, section 14, which enacts, that the rule of limitation there laid down is excepted, when "good and sufficient cause" has been shown, which precluded the Plaintiff from obtaining redress. Here the cause of action only accrued at the date of the final decree of the High Court of the 30th of *June*, 1863, which declared the auction sale void. The suit to recover the arrears of rent was brought in *October*, in the same year. Such

suit was, therefore, not affected by the above Acts, for until the sale was declared invalid the right to sue for the arrears could not arise.

The Right Hon. Sir JAMES W. COLVILE.

The facts of this case are simply these. The Appellant is a *Zemindar*. Those whom she represents had granted a *Putnee talook*, and the *Putneedars* had fallen into arrears of rent. The *Zemindar*, the Appellant, pursued her remedy under Regulation VIII. of 1819, and brought the *Talook* to sale. It sold for a sum greatly in excess of the rent in arrear. The Purchaser was put in possession of the *Talook*. Out of the purchase-money the arrears were paid, and the balance, in the ordinary course, remained in the Collector's hands, for the benefit of those who were entitled to it. A suit was then brought to set aside the sale of this *Putnee talook*, on the ground of irregularity; and we must assume that it was correctly set aside by the judgment of the Court below. The first judgment on the case was on the 26th of *December*, 1860. The Appellant brought her appeal in the High Court; and the final judgment, dismissing her appeal, was on the 30th of *June*, 1863. The effect of the judgment was, that she had to pay back the purchase-money to the Purchaser, with interest; that the *Putneedars* were again put into possession of the *Talook*; and that they recovered the mesne profits, during the period in which they were out of possession, from the Purchaser. The Appellant then brought the present suit for recovery of the arrears of rent. She brought it in the Collector's Court, as in an ordinary case, and must, therefore, we apprehend, be taken to have brought it under

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Act, No. X. of 1859. She was then met by the defence that the suit was out of time, that it was barred by the 32nd section of that Act; the construction put on that enactment being, that the suit should have been brought within three years from the time on which these arrears first became due, viz., the last day of the year for which the rents constituting them had accrued. The result of the decision is, that she has not only lost the remedy which *Ben. Reg. VIII.* of 1819 gave her, but that she has no other remedy for those arrears of rent. If that decision is founded upon grounds which cannot be shaken, it certainly is a very unfortunate result, and a result which obviously works a great injustice; for the *Putneedars* have got back their *Putnee*, and have, at the same time, relieved themselves from the obligation of paying for that period, the very rent upon which they held it.

The case of the Appellant has been argued on various grounds. Mr. *Cave* has argued, that this clause is to be qualified by introducing certain clauses of the old Regulation of limitations of 1793. He has also argued, that if those claims can no longer be imported into the consideration of the case, it falls within one of the exceptions imported into the existing Act of limitation—the Act, No. XIV. of 1859.

Their Lordships are of opinion, that if this case had arisen in an ordinary Court of Law, and that the law of limitations to be applied was Act, No. XIV. of 1859, there could be no doubt at all upon the question; and that it would not be necessary to fall back upon the exception referred to by Mr. *Cave*, because it seems to their Lordships to be perfectly

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clear, that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay this sum of money revived; and whether that time be taken to be the date of the first decree, or the date of the final decree, the present suit would, in either case, have been brought in time. They do not, however, think it necessary to decide that either that Act, or the particular exception in it, is to be brought in to qualify the peculiar and special law of limitations introduced by the Act of 1859, because they think that, upon the fair construction of the 32nd section of that Act, the time had really not run. Their Lordships' view of the case is this: that, upon the setting aside of this sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place. It follows, that upon the language of the 32nd section of Act, No. X. of 1859, the Appellant was not barred from her remedy. Their Lordships further authorize me to say, that they do not concur in the view taken by the High Court, that the Appellant can be said to have committed an act of trespass, because, when she pursued the remedy, which was clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act, and that her proceedings, therefore, became inoperative. Their Lordships cannot treat this as an act of trespass, or hold with the High Court, that in bringing this suit she is a person seeking to take advantage of her own wrong. They must also respectfully dissent

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from another statement of the learned Judges of the High Court, to the effect that the Appellant might have sued for these arrears pending the proceedings to set aside the sale of the *Putnee*. It is clear, that until the sale had been finally set aside, she was in the position of a person whose claim had been satisfied; and that her suit might have been successfully met by a plea to that effect.

On these grounds, their Lordships are prepared to recommend to Her Majesty that the appeal be allowed with costs, that the judgment of the High Court be reversed, and, in lieu thereof, that the appeal to that Court be dismissed, and the judgment of the Court below affirmed with costs.

An Order in Council reversing the decision of the Court below was made thereon.

Ex parte KISTO NAUTH ROY.*

2nd Feb.,
1869.

The re-hearing of an appeal heard *ex parte*, on which an Order in Council had been made, refused, the default in not appearing and contesting the appeal being occasioned by the Agents of the Respondent, who sought to have the appeal re-heard.

A petition for re-hearing the above appeal was afterwards presented by *Kisto Nauth Roy*, one of the parties to the same.

The petition alleged, that on the 19th of *August*, 1864, the Petitioner obtained a decree in his favour in the High Court at *Calcutta* in a suit brought by the Appellant, *Mussumat Ranee Surno Moyee*, against the Petitioner and others, and that from that decree the *Ranee* appealed to *England*; that in the month of *September*, 1867, the Petitioner instructed his

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor :—The Right Hon. Sir Lawrence Peel.

A re-hearing will not be allowed except under very special circumstances.

Agents in *England* to appear for him in the appeal, and take all necessary steps on his behalf, with a view of maintaining the decree of the High Court; that on the 23rd of *October*, 1867, the Petitioner's Agents attended the Privy Council Office, and made inquiries with respect to the appeal, and were informed that the record of the appeal had not yet arrived in this country; that the Agents on the same day wrote a Letter to the Registrar of the Privy Council, headed "*Ranee Surno Moyee*, Appellant; and *Kisto Nauth Roy*, Respondent," asking him to give them notice when the transcript arrived, and to enter an appearance in their names for the Petitioner; that the appeal was, notwithstanding many inquiries by his Agents, and every diligence on the part of the Petitioner, set down for hearing, and ultimately heard *ex parte* in the absence of the Petitioner, and judgment given on behalf of the Appellant; that the Petitioner had ascertained that in the certificate of the Registrar of the Indian Court accompanying the transmission of the record to *England* the title of the appeal was given "*Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*," without adding the words "and others," and that in consequence of this omission and mistake the appeal was entitled in the same manner in the record of the Privy Council Office, and that the Appellant having many other appeals pending before the Privy Council, the Officers of the Privy Council were misled by such title, and unable to give your Petitioner information of the steps taken in the appeal; that there were other parties Defendants in the suit, but that the Petitioner and *Shooshee Mokhee Burmonia* alone appealed from the Court of First Instance to the High Court, and that in the proceed-

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ings in the Court below the Petitioner's name was sometimes used first, and sometimes the name of *Shooshee Mokhee Burmonia*; and the Petitioner stated, that he had used every diligence to have the appeal argued on his behalf before the Privy Council, and submitted that a re-hearing of the appeal so heard *ex parte* ought, under such circumstances, to be allowed, and prayed that he might be at liberty to appear to and argue such appeal.

Mr. *Manisty*, Q.C., and Mr. *Doyne*, for the Petitioner.

There was a *bona fide* intention on the part of the Petitioner to appear and support the decree made in his favour by the High Court. He had retained Counsel, who were to be instructed at the hearing of the appeal. No default can be imputed to his Agents in *England* for not entering an appearance, and the hearing took place under circumstances over which he had no control. The Petitioner's Agents were misled by the name of the Petitioner being omitted in the title of the appeal transmitted from *India*, the fact being, that there were other appeals then pending by the same Appellant in which the Petitioner was not a party. A re-hearing of an appeal heard *ex parte* in similar circumstances was granted in *Rajundernarrain Rae v. Bijai Govind Sing* (a); *Dumaresq v. Le Hardy* (b). There the law and practice in such circumstances were investigated, and are fully stated both in the argument and judgment, and in the notes appended by the Editor to the report.

(a) 1 Moore's P. C. Cases, 117.

(b) 1 Moore's P. C. Cases, 127.

Mr. *Cave*, for *Mussumat Ranee Surno Moyee*,
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Nothing is shown to entitle the Petitioner to the extraordinary relief now asked for, and there does not appear to have been a *bonâ fide* intention to enter an appearance, no step being taken until the Order in Council was made reversing the decree of the Court below. In such circumstances, the Court will adopt the rule laid down in *The Singapore and The Hebe* (a); *The Montreal Assurance Company v. McGillivray* (b); *Motz v. Moreau* (c); and refuse the application.

Judgment was reserved, and now delivered by
Lord CHELMSFORD.

6th Feb.,
1869.

This is a petition for the re-hearing of an appeal from a decree of the High Court of Judicature at *Fort William* in *Bengal*, which was heard *ex parte* on the appearance of the Appellant alone, and in which their Lordships agreed to recommend to Her Majesty that the appeal should be allowed, and the decree of the Court below be reversed.

The Petitioner, one of the Respondents in the appeal, prays for a re-hearing, on the ground that he had fully intended to appear in support of the decree and had given instructions to his Agents in *England* to enter an appearance for him, and take all necessary steps for maintaining the decree, but that neither he nor his Agents had any notice that the appeal had been entered, nor were they aware of its having been fixed for hearing until after the

(a) 4 Moore's P. C. Cases (N.S.), 271; S. C. Law Rep. 1 P. C., 378.

(b) 13 Moore's P. C. Cases, 125. (c) 13 Moore's P. C. Cases, 376.

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hearing had taken place, and the report made to Her Majesty in Council had been agreed to.

In support of the petition the case of *Rajunder-narain Rae v. Bijai Govind Sing* (a) was relied upon to show, that it is competent to their Lordships, even after a report to the King and the confirmation of the report, to recommend that there shall be a re-hearing.

Such an unusual indulgence, however, ought never to be granted except under very special circumstances, and only where the *ex parte* hearing has not been occasioned by any default in the party applying for a re-hearing. The case referred to was one of this exceptional character. The hearing was *ex parte* upon the appearance of the Respondent alone, and the Committee, adopting a form of Order which had been used on previous occasions, affirmed the decree of the Court below, and dismissed the appeal with costs. Upon a petition by the Appellants, praying to have the Order for dismissing the appeal and affirmance of the judgment recalled, and for leave to prosecute their original petition of appeal, their Lordships considered, that a simple dismissal was to be regarded as the Order which must have been in their contemplation, and that no more could have been intended in substance, although the objectionable form importing affirmance was followed. And upon the application for a re-hearing, Lord Brougham, in delivering the opinion of the Committee, stated that the case for indulgence was a strong one, provided there was power to grant the application. The parties were infants under the Court of Wards in

(a) 1 Moore's P. C. Cases, 117.

Calcutta, and appeared by a public functionary through the appointment of that Court as their guardian *ad litem*; this person neglected the case altogether, and not only did not provide funds for carrying it on, but absconded with the fund in his hands which had been allowed for the expense of the suit, and he was not to be found when the Agent here desired to communicate with him, nor had he since returned. Their Lordships, therefore, thought "in the particular circumstances of the case," His Majesty should be advised to amend the Order, and to let in the Appellants to be heard, notwithstanding the dismissal, that is to say, "to restore the appeal," but the conditions were imposed of payment of the Respondent's costs occasioned by the default at the time of the *ex parte* report, and also by the application for a re-hearing.

In the present case it cannot be truly alleged, that the *ex parte* hearing took place without any default on the part of the Petitioner or his Agents.

The appeal was from a decision of the High Court of Judicature at *Fort William* in *Bengal*, in favour of the Defendants, in a suit in which *Mussumat Ranee Surno Moyee* was Plaintiff, and *Shooshee Mokhee Burmonia*, the Petitioner, *Kisto Nauth Roy*, and several others, were Defendants.

In the certificate of the Registrar of the Court accompanying the transmission of the record, the only Defendant named in the title of the appeal was *Shooshee Mokhee Burmonia*, without the addition of the words "and others;" but in the record itself the words "and others" were added to the name of the Defendant. The Petitioner's instructions to his Agents probably named only himself as the Re-

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spondent in appeal, because a Letter, dated the 23rd of *October*, 1867, was written by them to the Registrar of the Privy Council in these words :—

“ *Ranee Shurno Moyee*, Appellant,
and
Kisto Nauth Roy, Respondent,
In appeal from *Bengal*.

“ We are instructed on behalf of the Respondent in the above appeal, and shall be obliged by your giving us notice when the transcript of proceedings arrives in this Country, and by your entering an appearance in due time in our names on behalf of the Respondent.”

The Agents made inquiries at the Council Office on the day this Letter was written, and also subsequently in the same month of *October*, whether the record in the appeal had arrived. As there was no appeal with the title named in the Letter, they were of course answered in the negative. The misinformation as to the non-arrival of the proceedings in this Country was owing to the inaccurate description of the appeal given by the Petitioner to his Agents. This inaccuracy is inexcusable, because he knew perfectly well that there were many other Respondents beside himself, and that his name did not stand the first amongst the Defendants in the title of the suit. All the ignorance of the proceedings taken on the part of the Appellant resulted from the Petitioner having thus originally misled his Agents in his instructions to them. The Agents themselves, too, are not wholly free from blame. They should not have been satisfied with having requested the

Registrar to give them notice of the arrival of the proceedings, which it was no part of the duty of his office to do, but they should have examined for themselves at the Council Office, and, having the name of the Appellant accurately given, they would have ascertained that there was an appeal by him, and upon the production of the proceedings they would have found that to the name of the Respondent there were added the words "and others," which would have led to a further examination, and to the discovery that it was the appeal in which the Petitioner was interested, and in which they were instructed to appear for him. Under these circumstances, to grant the indulgence of a re-hearing to the Petitioner, would be to give him the benefit of his own and his Agents' default.

It is necessary to distinguish this case from that of *McLeary v. Hill* and others, which was heard by this Committee on the 30th of *June*, 1868, and in which their Lordships intimated their opinion, that the decree appealed from ought to be varied and amended, and directed minutes of the proposed report to be prepared by the Counsel for the Appellant. This was accordingly done, and on the 2nd of *July* the minutes were approved and adopted by their Lordships, and were afterwards, on the 7th of *July*, submitted to Her Majesty for approval. Immediately after the Order in Council had been made, the Registrar, in drawing the final Order, discovered that the Appellant's Solicitor had omitted to take out and issue the usual process requiring four out of the five Respondents to appear to the appeal, although he had issued the regular process against the fifth Respondent. The Registrar reported this fact to their Lordships, and

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BURMONIA.

KISTO NAUTH
ROY.

on the 10th of *July* their Lordships reported to Her Majesty that the Order of the 7th of *July* ought to be revoked. The appeal then stood over for further directions, and the Appellant was ordered to serve a personal notice of the appeal on each of the four Respondents who had not appeared.

The distinction between this case and the present is, that in *McLeary v. Hill* and others, the Appellant had neglected to take an essential step in the appeal, and was, therefore, not entitled to set down the case *ex parte* as against the Respondents. In the present case, although no appearance had been entered on behalf of the Respondents, or either of them, the Appellant had done all she was required to do by the practice and rules of the Judicial Committee, and the omission and neglect is that of the Petitioner, who now asks for a re-hearing of the appeal. The petition must be dismissed with costs.

RAJAH SUTTOSURRUN GHOSAL ... *Appellant*,
 AND
 MOHESHCHUNDER MITTER ... *Respondent* ;
 AND
 RAJAH SUTTOSURRUN GHOSAL ... *Appellant*,
 AND
 TARINEE CHUNDER GHOSE ... *Respondent*.*

*On appeal from the High Court of Judicature
 at Calcutta.*

THESE several appeals involved the same question, and related to the right of the Respondents, proprietors in certain shares of a permanently settled

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. Sir Fitz Roy Kelly. (The Lord Chief Baron of the Exchequer),

Assessor :—The Right Hon. Sir Lawrence Peel.

18th Dec.,
 1868.

A Purchaser of a permanently settled *Talook* (sold at an auction sale, under *Ben. Reg. XI.* of 1822, for arrears of Government

revenue), has no power as such auction Purchaser to enhance the rent of a holder of lands in the *Talook*, who is in possession under a title founded on a *Pottah*, or Lease, dated in 1786 (before the Decennial Settlement), at a fixed and invariable rent paid at and since the date of such *Pottah*.

Held further, following *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 191), that the absence of words of limitation in the *Pottah* which create an *Istemrari* tenure, was supplied by evidence (1) of long and uninterrupted enjoyment at a fixed rent; and (2) of the descent of the tenure from Father to Son; by which the hereditary character was to be legally presumed.

With respect to the rights of Purchasers under an auction sale for arrears of revenue by force of sections 30, 31, 32, and 33 of *Ben. Reg. XI.* of 1822 Held, that those enactments are repealed by Act, No. XII. of 1841, and the latter Act by Act, No. I. of 1845, which is confined to "future sales" under that Act.

The case of *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123) reviewed and approved.

Whether, section 5 of *Ben. Reg. XLIV.* of 1793, can be held in force for any purpose but that of declaring the general principles upon which subsequent legislation has proceeded, namely, putting a Purchaser at an auction sale for arrears of revenue, in the position of the party with whom the Perpetual Settlement of the estate was made. *Quære?*

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Talook in the Twenty-four *Pergunnahs* to enhance the rent payable by the Appellant to them for lands held by him as their tenant.

One of the suits was brought by the first Respondent as the proprietor of a 10 annas and 10 g. share in the *Talook* against the Appellant to enhance his rent, and the other suit was brought by the second Respondent, the owner of a 5 annas and 10 g. share in the same *Talook* against the Appellant for the same purpose. The Respondents, in both suits, claimed all the rights and powers of avoiding, and annulling tenures and enhancing the rent conferred on Purchasers of a *Talook* or *Zemindary* at a public sale for arrears of Government revenue, under *Ben. Reg. XI.* of 1822, as deriving their title through the original Purchaser at such sale.

The Appellant's case was, that an invariable fixed and uniform rent had been paid under a *Pottah*, or lease, dated in 1786, A.D., before the Decennial Settlement, for a period of seventy-three years, by him and his predecessors, from whom he derived title by hereditary succession; which fixed rent had been acquiesced in by the *Talookdars*, for the time being, down to the institution of the above suits, and he contended, that it was not competent to either of the Respondents to enhance his rent.

The *Sudder Ameen* (*Baboo Norotun Mullick*) before whom the suits were in the first instance tried, decided, that the *Pottah* was genuine and operative, and that as under it, for a period of upwards of sixty years, and before the Decennial Settlement, rent had been paid by the Appellant, and those under whom he derived title, at a uniform rate the rent could not be enhanced. On appeal, *Koonjoololl*

Bannerjee the Principal *Sudder Ameen*, in effect, affirmed the finding of the Lower Court as to the genuineness of the *Pottah*, but held, that there was no express limitation in it, that it should be held hereditary, without increase of rent, and that it could not be considered as *Mourassee*; that the land included in the *Pottah* was not proved to have been held at a uniform rent for twelve years before the Decennial Settlement, and that, therefore, it was not exempt from assessment, and accordingly so far reversed the Lower Court's decree, and ordered an assessment of the lands of the Appellant. The High Court at *Calcutta*, consisting of Messrs. *Kemp* and *Seton-Karr*, on special appeals from decrees founded on this finding, affirmed the same. The present appeals were from their decision.

The Respondents not appearing, the appeals were heard *ex parte*.

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellant in each appeal,

Referred to the following cases:—

First, on the question of the right of the Respondents, as *Zemindars*, to enhance rent held in *Putnee* tenure, *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (a); secondly, as to the application of the law of limitation to such tenure in a suit for enhancement of rent, and the effect of the Government sale law in respect to the right of auction Purchasers, *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (b); *Degumber Mitter v. Ramsoonder Mitter* (c); and *Ben.*

(a) 10 Moore's Ind. App. Cases, 123.

(b) 10 Moore's Ind. App. Cases, 183.

(c) 7 Ben. Sud. Dew. Ad. Rep., 617.

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1868.

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Regs. V. of 1812, sec. 9; XI. of 1822, secs. 30, 31, 32, 33; Acts, No. XII. of 1841, Nos. I. X. of 1845, and Nos. X. & XI. of 1859; and, thirdly, they insisted, that the dealings with, and the hereditary character of the tenure under which the Appellant and his predecessors had held the land, supplied the want of words of limitation in the *Pottah*; *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (a).

Their Lordships' judgment, in both appeals, was pronounced by

The Right Hon. Sir JAMES W. COLVILE.

18th Jan.,
1869.

The question raised on these appeals is, whether the Respondents (being the Plaintiffs in two different suits) have established, as against the Appellant, their right to enhance the rent payable by him in respect of 134 *beegahs* and $2\frac{1}{2}$ *cottahs* of land, situate in the Twenty-four *Pergunnahs*.

This parcel of land is alleged in both suits, to form part of a *zemindary*, of which somewhat more than ten undivided sixteenths belong to *Moheshchunder Mitter*, the Respondent on the first appeal, and the remainder, being somewhat less than six sixteenths, belong to the Respondent in the second appeal, or, rather, his Master, *Degumber Mitter*.

Moheshchunder Mitter claims title to his portion of the *zemindary* as the Nephew *ex parte maternâ*, and representative in estate of one *Gunganarain Ghosal*, who purchased it at a sale for arrears of Government revenue in 1839, and died in 1851. *Degumber Mitter's* title to his portion is derived through several

(a) 10 Moore's Ind. App. Cases, 191.

successive alienations from some person who purchased that portion at a similar sale in 1837. From the fact that these undivided portions of the *zemin-dary* were thus sold at different Government sales, it is to be inferred, that before those sales they were held by different parties, each of whom was separately liable for his share of Government revenue.

In these circumstances, the two *Mitters* have brought separate suits for the enhancement of the rent of the lands in question; and for the purposes of these appeals, their Lordships will assume, that in the Courts below they have been properly held entitled so to do, though there certainly appears to have been a well-grounded objection to the form in which the complaints were originally framed.

In each case the Plaintiff rests his claim to enhance on the statutory rights of a Purchaser at an auction sale, meaning thereby, a sale for arrears of Government revenue; and the Regulation under which each of the sales in question took place was *Ben. Reg. XI. of 1822.*

The defence in the two suits was very much the same. The Appellant insisted, that of the land in question, 67 *beegahs* and 3 *cottahs* had been held by him and his ancestors under a *Pottah*, dated in 1786, at a fixed rent of S. Rs. 163. 13a. 10p.; that of the rest of the lands, 42 *beegahs* and 14 *cottahs* were *Lakhiraj*; and the remainder, either including, or, perhaps, with the exception of a very small portion which had been resumed by Government as a towing-path, was held by him as part of a different *Talook*, under one *Ramtonoo Dutt*. He further insisted, that the suits were barred by lapse of time, twelve years

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having in each case elapsed since the date of the purchase at the auction sales. And, in *Degumber Mitter's* suit, he further questioned the right of one who was a mere Purchaser by private contract from one who had bought at a Government sale to institute such a suit. He also raised the question, whether, the suit ought not, under cl. 7 of the 23rd section of Act, No. X. of 1859, to have been brought in the Collector's instead of the *Zillah* Court.

Their Lordships think it will be convenient, in the first instance, to consider the Respondent's claim to enhance, as if all the lands in question were covered by the *Pottah* of 1786.

Both the Courts below, which dealt with the questions of fact, have affirmed the genuineness of that *Pottah*, and their Lordships see no reason for impeaching it.

Again, though the document is not in the form of the ordinary instruments which create an *Istemrari* tenure, it is in terms a grant of the lands at a fixed rent, for it specifies the sum. And, upon the principle laid down by this Committee in the case of *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 191), the absence of words importing the hereditary character of the tenure is here, as in that case, supplied by evidence of long and uninterrupted enjoyment, and of the descent of the tenure from Father to Son, whence that hereditary character may be legally presumed.

Upon the evidence their Lordships have no doubt, that at the date of the earliest of the Government sales, those whom the present Appellant represents were, by virtue of the *Pottah*, in possession of the

land which it covers at a fixed rent, under a sub-tenure upon the then *Zemindars*.

It follows, that the Respondent's right to enhance the rent, which implies a right to vary the terms of the sub-tenure, and to set it aside, if that title to enhance be disputed on grounds inconsistent with the obligations of such a dependent tenure, must, if it exists at all, depend upon the peculiar and statutory powers acquired by a Purchaser at a sale for arrears of revenue. And accordingly, both in the plaints and in the notices given in pursuance of *Ben. Reg. V. of 1812, sec. 9*, those powers are put forward as the foundation of the right.

The first question, then, is—Are the Respondents, or is either of them, entitled to exercise those powers? That neither is so entitled has been strongly argued by the learned Counsel for the Appellant, upon the following among other grounds. The sales took place under *Ben. Reg. XI. of 1822*; and the rights of the Purchasers through whom the Respondents claim were defined by the 30th and three following sections of that Regulation. Those enactments were repealed by the 1st section of Act, No. XII. of 1841; and all the provisions of that Act, with the exception of the first and second sections, were again repealed by Act, No. I. of 1845, which, as modified by some subsequent Acts, is the existing sale law. Neither of the two last-mentioned Acts contains any saving of rights acquired under the Acts which it repealed; and though each gave to Purchasers at sales for arrears of Government revenue powers equal to or even larger than those given by the repealed Acts, it expressly limited those powers to Purchasers at future sales, *i.e.*, “sales under this Act.” The Respon-

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dents, therefore, cannot invoke Regulation XI. of 1822, as the foundation of their alleged rights, because that has been absolutely repealed; and they cannot call in aid the subsequent Acts, because they have given no power to Purchasers at sales which took place before they were passed.

This point, though it seems to have been overlooked in many cases in *India*, is not now adjudged here for the first time. It was fully considered and determined by this Committee in the case of *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadur* (10 Moore's Ind. App. Cases, 123). The Judges of the High Court have attempted to distinguish that case from the present, on the ground that in the former the sale relied upon was made under *Ben. Reg. XLIV. of 1793*. But that statement proceeds upon a misapprehension of the facts of the earlier case. In that, as in these, the sale on which the power to enhance depended had taken place under *Ben. Reg. XI. of 1822*; and it was not until they found that they could not support their case, either on that repealed Regulation, or on the subsequent Acts, that the learned Counsel for the Respondent, the *Maharajah*, fell back upon the 5th section of *Ben. Reg. XLIV. of 1793*, which, though suspended by the subsequent Legislation on the subject, had never been expressly repealed.

Their Lordships must also observe, that in the judgment delivered in that case it was carefully considered, whether a sale for arrears of revenue of itself merely, and without any act, proceeding, or demonstration of will on the part of the Purchaser, altered the character of the tenure. And it was decided, that the sale law had not "that hard and rigid

character." It is true that the judgment, assuming that the powers given by *Ben. Reg. XI. of 1822* had been swept away by the repeal of that Regulation, dealt only with the effect of a sale under *Reg. XLIV. of 1793*. But what is laid down concerning such a sale may, even *à fortiori*, be predicated of a sale under any of the subsequent sale laws, and, in particular, of one under *Regulation XI. of 1822*. For the words of the Regulation of 1793 (sec. 5) are, that all engagements of the former proprietor, and all under-tenures granted by him, shall "stand cancelled from the day of sale;" whereas the Regulation of 1822 (sec. 30) enacts, that "all tenures which may have been created by the defaulter or his predecessors, being representatives or assignees of the original Engager, as well as all tenures which the first Engager was competent to set aside, alter, or renew, shall be liable to be avoided and annulled by the Purchaser, &c.,"—expressions which, far more strongly than those of the earlier Regulation, import that the estate is not, upon a sale for arrears of revenue, necessarily and *ipso facto*, changed in its nature and incidents. And, if this be so, the repeal of the Regulation which destroys the power to change the estate, must leave its freedom from change, independent of mutual will, unimpaired.

Their Lordships, then, being clearly of opinion, both upon principle and the authority of the decision in *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123), that the Respondents cannot now for the first time exercise powers which, if they ever existed, existed only by virtue of the repealed sections of *Ben. Reg. XI. of 1822*, do not deem it necessary to consider, whether

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the stringent powers given by those enactments to Purchasers, *eo nomine*, could in any case be exercised by the heirs or assignees of such Purchasers. Justice and sound policy alike require that inasmuch as the Law has given them for the particular purpose only of enabling the Purchaser again to make the income of the estate an adequate security for the public revenue assessed upon it, and the exercise of them cannot but occasion great hardship to under-tenants, and insecurity to property, they should be exercised within a reasonable time. And their Lordships believe that that object has now been in some measure secured by Acts, Nos. X. and XIV. of 1859.

Their Lordships have further to remark, that in the case of the *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor*, to which they have already referred, this Committee, whilst it carefully abstained from determining whether, upon the true construction of all the Regulations taken together, the 5th section of Regulation XLIV. of 1793 ought to be taken to have been repealed, nevertheless proceeded to consider whether that enactment, if assumed to be still in force, would support the Respondent's case. And after putting upon the section the construction stated at page 147 of Vol. 10, Moore's Ind. App. Cases, the judgment ruled, that the Purchaser had an option to confirm the existing rate of rent, and must, upon the evidence in the particular case, be taken to have exercised that option in favour of the dependent *Talookdar*.

Their Lordships must reiterate the doubts expressed by those who decided the case of the *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy*,

Bahadoor, whether the clause in question can be held to be in force for any purpose but that of declaring the general principles upon which all the subsequent legislation has proceeded, viz., that of putting a Purchaser at a sale for arrears of revenue in the position of the party with whom the Perpetual Settlement of the estate was made. They do not think that a party who has lost the particular rights which were given to him, or to the Purchaser whom he represents, by any of the subsequent Statutes, can fall back upon the old law which has been so repeatedly modified.

It is to be observed, however, that, even if the section be in force, the tenure here in question is not one which, upon the strictest interpretation of that clause, could stand cancelled. It existed at the time of the Decennial Settlement, and their Lordships apprehend, that the only right which the *Zemindar* with whom that Settlement was made could have exercised over it was that conferred by section 51 of *Ben. Reg. VIII.* of 1793. No attempt has been made to bring the present cases within that section, which seems to cast upon the *Zemindar* the burthen of proving particular grounds for enhancement of rent.

Upon the whole, then, their Lordships are of opinion, that the Court of the Principal *Sudder Ameen* and the High Court of *Calcutta* were in error in holding that the Respondents had established their right to enhance the rent of the lands covered by the *Pottah* of 1786.

It may be said, that this does not dispose of the question as to the other parcels of land. But the foundation of the suit is, that the Respondents have

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the powers of Purchasers at sales for arrears of revenue; and if that foundation fails, the failure is fatal to the whole suit. Their Lordships, however, are of opinion, that there are further objections to the maintenance of the present suits in respect of those parcels of land. There is no evidence that the Appellant has ever paid to the Respondents any rent except the sum of S. Rs. 136. 13a. 10p., being the rent reserved by the *Pottah* in respect of the 67 *beegahs* and 3 *cottahs*. He disputes the title to rent in respect of the other parcels, treating one parcel as *Lakhiraj*, the other as held of a different Landlord. A suit for enhancement implies such a privity of title or tenure existing between the parties, that a claim to some rent is legally inferrible from it, and there is here proof that that relation is denied to have existed at any time between the parties in respect of these two parcels of land. As to the latter portion, where the Respondents' title is denied and the right of another *Zemindar* set up, the proper remedy seems to be by a suit in the nature of an ejectment. Again, if the lands alleged to be *Lakhiraj* lie within the Respondents' *zemindary*, the law has given them an appropriate remedy in a suit for resumption and re-assessment.

The present decision will not deprive them of either remedy, if sought by them in the character of ordinary *Zemindars*. But it is to be observed, that a suit of either kind is now subject to a particular law of limitation, and that consideration is a strong ground for not allowing such rights to be irregularly litigated in a suit like the present, which is subject to a different, if it is subject to any, rule of limitation. Upon the whole, therefore, their Lordships have

come to the conclusion, that they must recommend to Her Majesty to allow these appeals; to reverse the decrees of the Court below, and in lieu thereof to Order, that both suits be dismissed with costs. The Appellant will be entitled to the costs of these appeals; but it will be for the Registrar, in taxing those costs, to consider whether the costs of more than one case should be allowed (a).

1868.
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RAJAH SAHIB PERHLAD SEIN ... *Appellant*;

AND

BABOO BUDHOO SING ... *Respondent*.*

On appeal from the Sudder Dewanny Adawlut of Bengal.

THE suit in this appeal was brought by the Widow of the late *Khajah Talib Ally Khan*, against the Appellant, to oust him from possession of one-fourth of his ancestral *zemindary* of *Ramnuggur* by force of

8th & 9th
 Feb., 1869.

Suit for possession of a four-anna share of a *Raj* and *Zemindary* under a *Kowala*, or a Bill of Sale, purporting to be an absolute sale for the

* Present :—Members of the *Judicial Committee* :—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor :—The Right Hon. Sir Lawrence Peel.

sum of Rs. 75,000, executed at a time when the alleged Vendor was not in possession or had established his title to the *Raj* and *Zemindary*. The Vendor who established his title to the *Raj*, and was in possession, by

(a) See *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, ante, p. 157.

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SING.

a *Bynama*, or Bill of sale, dated in 1841, executed by the Appellant, which instrument purported to sell and convey to *Sultan Jan*, the Father of her late Husband, *Khajah Talib Ally Khan*, such one fourth, for the sum of Rs. 75,000, therein stated to have been paid to the Appellant upon the execution of the instrument. A previous suit by the *Khajah* against the Appellant for the same object had been dismissed by the *Zillah* Judge, and confirmed on appeal by the *Sudder Dewanny Adawlut*. By the former Court on the merits, and by the latter on the ground of the insufficiency of the stamp on the copy of the *Bynama* and receipt which were put in evidence.

The principal question raised in the present suit was, whether the purchase-money, mentioned in the Bill of sale and in the receipt, was the true consideration for the former, and, further, whether it had been actually paid at the time of the execution thereof, as alleged and contended for by the Plaintiffs; or

his answer set up this case; that being in want of money to carry on suits to recover the *Raj* and *Zemindary*, he applied to one K. (whose rights had become vested by purchase in the Plaintiff), who agreed to make advances to him on condition of his executing the Bill of Sale, and that no part of the consideration money there expressed was paid on execution of the Bill of Sale, though some inconsiderable advances were made to him; that he was afterwards pressed to execute a Bond to secure the same sum of Rs. 75,000, hypothecating the whole *Raj* and *Zemindary* in substitution of the Bill of Sale, but that no consideration was paid on that occasion; the real contract being one to secure moneys already advanced, and future advances, which contract had not been complied with by K's Assignee:—Held, by the Judicial Committee, upon the evidence, that the real arrangement between the parties was for K. to make advances, from time to time, and that the form of the contract was a device adopted to evade the effect of the transaction being stamped with the character of champerty, and the Bill of Sale set aside.

In a suit so framed to obtain possession, the appellate Court will not impose terms upon the Defendant to repay the advances made by K. as the Plaintiff, his Assignee, had his remedy, and could sue on the Bond.

Whether the effect of the execution of a Bill of Sale by a Hindoo Vendor is to pass the estate irrespective of actual delivery of possession, giving to the instrument the effect by English Law of a conveyance operating under the Statute of Uses. *Quære?*

whether, such consideration was merely nominal and not paid, as contended by the Appellant, and whether the instrument was not made and executed by the Appellant upon the faith and in consideration of a verbal agreement and undertaking at the time entered into by the Father of the *Khajah* to pay certain debts then due by the Appellant, and also, from time to time, to advance and pay the moneys required by him to meet the costs and expenses of the Appellant's carrying on several suits then pending, which involved the claims of several persons, including the Appellant, to succeed as heir to the *Raj* and *zemindary* of *Ramnuggur*. The non-performance of this agreement was admitted. Another question was also raised, viz., whether the Bond or *Tumusook*, subsequently executed, was granted and accepted in substitution and supersession of the previous Bill of sale, as contended by the Appellant.

By the decree of the Principal *Sudder Ameen*, *Mirza Mahomed Siddick Khan*, made in the suit, on the 28th of *May*, 1858, it was decided on the evidence, that the true consideration for the Bill of sale was not the sum mentioned therein and alleged by the Plaintiff to have been so paid, but the agreement and undertaking to advance and pay subsequently moneys to carry on the suit; that default had been made in the performance of such undertaking, and the terms and conditions thereof had not been performed, to the loss and injury of the Appellant. The decree accordingly set aside the Bill of sale, and dismissed the suit with costs.

This decree was appealed from to the Court of

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 PERHLAD
 SEIN
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Zillah Sarum, and the decree of the Principal *Sudder Ameen* modified and altered so far as ordered the Plaintiff to pay the Appellant's costs, but was in all other respects affirmed. The Judge (Mr. *Henry Atherton*) stated in his judgment, that he was clearly of opinion with his predecessor, the Judge of the *Zillah Court* (Mr. *Hathorn*, who had heard and decided a former suit, and whose judgment was put in evidence), that the Appellant did not receive the consideration-money mentioned in the Bill of sale, and that he was satisfied that the evidence in support of the Plaintiff's claim was false.

A special appeal was made from this decree to the late *Sudder Dewanny Adawlut*. The appeal was heard before Messrs. *Raikes* and *Bayley*, two of the Judges of that Court, who gave judgment on the 27th of *September*, 1860, to the effect that the execution and delivery of the Bill of sale perfected and completed the transaction. It then decided, that the Appellant having chosen to do so without receiving the purchase-money therein mentioned, such instrument, nevertheless, must be regarded "as a valid conveyance of his right and title to the purchaser, and debarred the Appellant from holding the land any longer as the Owner of it, the ownership then becoming vested in the Purchaser." The judgment afterwards proceeded in these terms: "It appears to us, however, that if possession be withheld in consequence of failure to pay up the whole amount of the purchase-money, and the seller be allowed to retain possession until such payment is made, it follows that he can only retain the estate as Trustee for the Purchaser, and that upon the principle of English Equity Law, the Vendor has only a right to a lien in the

estate to the amount of purchase-money unpaid to him. If so, all profits received by him must be accounted for, and when such profits have amounted to the purchase-money due to him, the debt of the Purchaser is discharged and the Seller is bound to deliver the estate forthwith to the Purchaser. It was admitted that equitably such a lien should exist for the benefit of the Vendor in all cases in which the Vendor can be entitled to look to such security as the estate itself, when the sale was made, but that in the present instance the Seller had no right to regard the estate he sold in the light of affording him additional security for his money, inasmuch as he was not himself in possession of the estate and had at the time only a lawsuit pending for its acquisition. Matters of this kind should, however, be first considered in the Courts below, where questions of fact can alone be determined." The decree then ordered a remand of the case to the *Zillah* Court, to be decided *de novo* by the Judge, but subject to the following instructions. "First, the Judge, having held that the Bill of sale was executed and delivered to the Plaintiff, should have also held the sale perfected and binding upon the Seller; second, under the precedents cited, and with reference to the plea that full consideration had not been paid, as a large amount, some Rs. 20,000, was considered by the Judge to have been advanced in part payment, while the Seller had kept possession for a series of years, he should have called upon him to account for the profits received by him, and if the full amount, with reasonable interest, was not discharged from that source he should only hold the Defendant (the Appellant) entitled to continue in possession upon the

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ground that he had a right to look upon the estate sold as burthened with such a lien, from the circumstances attending the sale of the property, and not otherwise. With these instructions, which the Judge of the *Zillah* Court could himself carry out, without remanding the case, under the new Code of Procedure, the case is remitted to be decided *de novo* in that Court, on the points mooted, or upon others which should arise on the pleadings."

The appeal was from this decree.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

The evidence failed to establish first, that the transaction in question was one of purchase and sale of the one-fourth part of the *Raj* or *zemindary*, or secondly, that any payment of the consideration money was mentioned when the alleged deed of sale was made. The Appellant, on the other hand, proved a verbal agreement between both parties with respect to the *Kowala* at the time of its execution, and that the party through whom the original Plaintiff and the Respondent claim title to the one-fourth, had made default, and failed to perform his part of the agreement. The evidence adduced by the Appellant also proved, that the Bond or *Tumusook*, subsequently executed by him, was demanded and accepted by the late *Khajah Talib Ally Khan*, in substitution and supersession of the alleged deed of sale now sought to be enforced. Under these circumstances, and the facts proved in the Court below, the Plaintiff would not be entitled to the aid and assistance of a Court of Equity, either in respect of the particular relief

prayed, or in respect of any relief whatsoever as against the Appellant, in respect of the one-fourth of the *Raj* and *zemindary*.

Mr. J. D. Bell, for the Respondent.

The instrument relied on by the Respondent was a valid instrument by way of sale of the property. It was necessary, according to the view of the case taken by the Court below, to have an account taken of the mesne profits of the four annas share received by the Appellant subsequent to the date of the sale, and to ascertain what actually was the consideration given. Without a further reference to the inferior Court to take evidence upon those points, the rights of the Respondent could not properly be determined. If the sale cannot be upheld, it is necessary, to do complete justice between the parties, that terms should be imposed on the Appellant to repay the advances made to him by the Father of the *Kajah*. He cited *Issurchunder Ghose v. Nil Kimmul Pal Chowdree (a)*.

Judgment was delivered in this case, and four other appeals affecting the same property, at the same time.—See *post*, p. 301.

(a) 7 Ben. Sud. D. A. Rep., 224.

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KALEEPERSHAD TEWARREE ... *Appellant*;

AND

RAJAH SAHIB PERHLAD SEIN ... *Respondent*.*

On appeal from the High Court of Judicature at Calcutta.

9th & 10th
Feb., 1869.

Suit to set aside a *Zur-i-peshgi* (usufructuary mortgage) of certain *mou-zahs*, part of the *Raj* of the Mortgagor, for securing re-payment of Rs. 49,453, under which the Mortgagees had been put in possession. The Plaintiff admitted his execution of the Deed, but alleged, that it was executed to

THE suit in this appeal was instituted by the Respondent in the Court of the Principal *Sudder Ameen* against the Appellant, and his Brother, *Mudun Mohun Tewarree*, since deceased, and one *Lalla Binda Lall*, the Appellant's *Mooktar*, to set aside and cancel a *Zur-i-peshgi* (usufructuary mortgage instrument) executed by the Respondent, as alleged, at the instance of *Lalla Binda Lall*, acting in collusion with the other Defendants, in whose favour it was made, relating to certain

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Assessor:—The Right Hon. Sir Lawrence Peel.

secure the amount of a Bond previously executed in favour of the Mortgagees as a further security to indemnify a third party, and security for him for advances in the prosecution of his claim to the *Raj*; that the conditions of the Bond to the Mortgagees not having been complied with, there was no sufficient consideration for the Bond and Deed which he had been fraudulently induced to execute. Held, that, in the first instance, it lay on the Plaintiff, who sought to set aside a Deed executed by him and perfected by possession, to make out the case alleged by him, and that the *onus probandi* was upon him to establish, at least, a good *prima facie* title to the relief prayed for, so as to cast on the Defendants the burthen of proving the consideration for the Deed.

In the absence of clear and consistent evidence on the Plaintiff's part, establishing that the Deed was obtained fraudulently and without consideration, such Deed sustained.

mouzahs (villages) specified therein, the property of the Respondent, and forming a portion of his *Raj* or *zemindary* of *Ramnuggur*, to secure the repayment of Rs. 49,458, with mesne profits during the period of possession under such Deed.

The grounds upon which the Respondent sought to set aside the above Deed were, first, that the consideration, viz., the payment of the sum of Rs. 20,000 to a third party, to whom the Respondent was indebted or under an obligation to pay that amount, had been fraudulently withheld, and had never been paid by the Defendants, and secondly, that the terms and conditions on which that instrument had been granted had never been complied with or performed by them, to the great pecuniary loss and injury of the Respondent.

It was, on the other hand, contended by Appellant and his Brother, the two principal Defendants, that the Deed was executed by the Respondent to secure a balance founded on a settlement of accounts, that the consideration money Rs. 40,101 had been, in divers amounts and at various times, prior to the execution of the Deed, lent by them as Bankers and money-lenders, to the Defendant, *Lalla Binda Lall*, as the Agent for and on account of the Respondent, and that the residue of the consideration of Rs. 49,453, had accrued due as interest upon the moneys so lent.

Evidence was entered into upon this disputed question of fact, the substance and effect of which is detailed in the judgment of their Lordships.

The Principal *Sudder Ameen* (*Sayud Mahomed Wuheedoodeen*) dismissed the suit on the ground, that *Lalla Banda Lall* had opened a money transaction with the other Defendants as Bankers and money-lenders in

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Calcutta, on behalf of the Respondent, his Master, and had misappropriated the money borrowed from them on his behalf.

On appeal the High Court, consisting of Messrs. *Steer* and *Seton-Karr*, reversed the above decision, on the ground, that the Defendants had failed to prove that they had given consideration for the Bond, and decreed that the *Zur-i-peshgi* deed should be set aside, but they declined to award any *wasilat* to the Respondent, as certain services done by the Defendants were taken and declared to be a set-off against the claim for mesne profits, and ordered that both parties should bear their own costs.

Kaleepershad Tewarree appealed from this judgment so far as it decreed the *Zur-i-peshgi* deed null and void. There was also a cross appeal by the Respondent against so much of the decree as rejected his claim for *wasilat*, and the refusal to give him costs of suit.

Mr. *Pontifex*, for the Appellant.

The execution of the Bond and Deed being admitted by the Respondent, the *onus* of proving that they were executed without valuable consideration lay on him, and he failed to prove that fact. Where a Deed on the face of it admits the consideration-money received by the Vendor or Mortgagor, the *onus* is on the party impeaching the Deed to disprove such admission which the Court below erroneously cast on the Appellant. *Maniklal Baboo v. Ramdass Mazumdar* (a). *Ben. Reg.* III. of 1793, sec. 15, which applies to Bonds, or that it was fraudulent. *Sirmundul Dass v. Chowdree Dyal-*

(a) 1 Ben. Law Reps., 92.

narain Singh (a); *Kirpanund Shaha* v. *Gobra Gunesh* (b); *Ramkishan Dass* v. *Baboo Juggutputtu Singh* (c); *Rice* v. *Rice* (d). The case set up by the Respondent is altogether improbable and unworthy of credit. It is not supported by evidence, and is wholly inconsistent with the facts proved, and the conduct of the Respondent in putting and allowing the Mortgagees to remain in possession of the *mouzahs*.

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Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Respondent.

The question, whether there was a good consideration for the Bond and Deed was distinctly raised by the issues in the Court below, and that question was purely one of evidence, which the Courts in *India* could best determine. The Defendants failed to prove the case set up by them as regarded the alleged consideration of the Bond and Deed. On the other hand, the Respondent substantially proved the case set up by him in his plaint in respect of such alleged consideration, as well as the terms and conditions on which both instruments were made and executed by him in favour of the Appellant and his deceased Brother. The Defendants having failed to pay the consideration money, or to perform the terms and conditions on which the Bond and Deed of *Zur-i-peshgi* were respectively executed; the consideration, therefore, failed through the wilful default of these two principal Defendants, and their possession and receipt of the rents and profits under the Deed was wrongful

(a) Decisions S. D. A., 30 May, 1857, pp. 925-929.

(b) Decisions S. D. A., 29 June, 1857, p. 1114.

(c) Decisions S. D. A., 1856, p. 1513.

(d) 2 Drew. 73.

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and without a just and *bonâ fide* title in law. They became, therefore, in respect of such possession, accounting parties to the Respondent on his recovering the *Raj*. With respect to the cross appeal the decree was wrong, as it ought to have directed the *wasilat* or mesne profits as well as costs of the suit.

For judgment see *post*, p. 311.

RAJAH SAHIB PERHLAD SEIN ... *Appellant*,

AND

DOORGAPERSAUD TEWARREE, *alias*
BOOTOO TEWARREE, MUNNE LALL
TEWARREE, and KALEEPERSHAD
TEWARREE, the Brothers, and the
Widow, the heirs-at-law of MUDDEN
MOHUN TEWARREE, deceased ... } *Respondents.**

On appeal from the High Court of Judicature at Calcutta.

10th & 11th
Feb., 1869.

To establish the right to *mouzahs* as forming part of a *Zemin-dary* under a *Mocurrery* grant, purporting to have been made by the

IN this case the appeal was brought from a decree of the High Court of Judicature at *Calcutta*, which confirmed a decree of the Judge of *Sarun*, both of which decrees were adverse to the Appellant. The

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Zemindar, in consideration of past services, the grant must be strictly proved. So held by the Judicial Committee, reversing the concurrent decisions of the Inferior and High Courts in *India* in a suit impeaching the validity of the grant, and the suit remitted with directions for a new trial on further evidence.

Costs of the appeal directed to be taxed, and to be costs in the cause to be dealt with by the High Court.

suit was instituted by the Appellant as *Zemindar* of the *Raj* and *zemindary* of *Ramnuggur*, against the Respondents, to oust them from two *mouzahs* or villages, named *Doobnee*, *Tuppah Ramguhr*, and *Buthowra*, *Tuppa Jumowlee*, situate in and belonging to the *Raj* and *zemindary* of *Ramnuggur*, which they were in possession of as alleged, but was denied by the Appellant under a *Mocurrery* grant (*bekh-birt*, from generation to generation,) an hereditary estate held at a fixed rent and purporting to have been made by the Appellant as *Zemindar* to one *Mudden Mohun Tewarree*, under whom the Defendants (the Respondents in the appeal) claimed. The suit also sought to set aside two proceedings of the Revenue authorities of the 9th and 16th *June*, 1856, under which *Muddun Mohun Tewarree*, on an allegation of his being *Mocurreredar*, was declared entitled to a sum of Rs. 189. 11. 3, being a portion of the rents and profits of the *zemindary* in respect of the villages, and which had been deposited in the collectorate, under an Order of the Collector for the attachment of the *Raj* and *zemindary* during the time that the right of succession and title thereto was in litigation between the Appellant and third parties, and for mesne profits.

By the decree of Mr. *W. H. Brodhurst*, the Judge of *Zillah Sarun*, dated the 17th *December*, 1862, it was declared first, that the villages had been in the possession of *Mudden Mohun Tewarree* and the Defendants claiming through him since the year 1256 *Fusly* (1848-9), the date of the alleged instrument of grant; and that the suit was, consequently, barred by *Ben. Reg. III.* of 1793, sec. 14, more than twelve years having expired before it was brought; and

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secondly, that the villages had been held under the above instrument of grant, which instrument was declared to have been proved by the witnesses, and, therefore, genuine and valid.

The Judges of the High Court, Messrs *Raikes* and *Seton-Karr*, on appeal, were inclined to think that the probabilities were in favour of *Muddun Mohun Tewarree* having held under the grant put in evidence by the Defendant, and that, as they were not satisfied that the decision of the Court below was wrong on the merits, they saw no reason to interfere with the judgment, and, therefore, dismissed the appeal, with costs.

From this decree of affirmance the present appeal was brought.

The facts are fully stated in their Lordships' judgment.

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellant; and

Mr. *Pontifex*, for the Respondent, *Munne Lall Tewarree*.

The question involved was entirely one of fact, namely, the genuineness and validity of the alleged *Mocurrery* grant by the Appellant to *Muddun Mohun Tewarree*, which, although purporting to have his seal, was not signed, and as subsidiary thereto, the circumstances under which *Muddun Mohun Tewarree* obtained possession of the *mouzahs* in dispute.

Judgment was reserved (see *post*, p. 329) and afterwards delivered with the judgment in the other four appeals.

RAJAH SAHIB PERHLAD SEIN ... *Appellant*;

AND

RUN BAHADOOR SINGH, and others ... *Respondents*.*

On appeal from the High Court of Judicature at Calcutta.

THIS, which was the fourth case, was an appeal from a decree of the High Court, made by Sir *Charles Jackson* and Justice *Kemp*, the presiding Judges, affirming a decree of the Principal *Sudder Ameen* of *Zillah Sarun*, which dismissed the suit of the Appellant, on the ground of being barred by the expiration of the twelve years period of limitation.

The suit was brought to recover possession of two *mouzahs*, *Gokla* and *Kullan Belonnia*, situate within the Appellant's *Raj* or *zemindary* of *Ramnuggur*, against the Respondents, with mesne profits, and to set aside two Deeds, the first called a *Bekhbarut*

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in the suit solely to one of limitation, and held the Plaintiff barred by the Regulations of limitation. Such finding reversed, on appeal, by the Judicial Committee, and the suit remanded to the Court below, to be tried on its merits.

As the miscarriage of the suit was occasioned by the manner in which the issue was framed by the Judge, the costs of appeal were directed to be costs in the cause.

12th Feb.,
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In a suit brought to recover two *mouzahs* in the possession of the Defendants, under a *Mocurrery* tenure, alleged to have been granted by the Plaintiff, the Deeds creating which he impeached as forgeries; the Courts below, without adverting to that allegation, or examining the merits of the case, confined the issue

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pottah, and the second a *Sudruth puttur*, dated in 1843-4, which had been set up by the Defendants, the Respondents, as the title Deeds under which they claimed to be in possession of the *mouzahs*, and as giving an hereditary title, at a fixed rent. These instruments, on which the title and possession of the Defendants rested, were in the plaint charged to be fabricated, and forged, and it was also stated that evidence in disproof of these alleged Deeds, and to prove collusion, would be adduced on the part of the Plaintiff. The cause of action was therein stated to have arisen on the 27th of *December*, 1854, the date of a proceeding of the Government Commissioner of Revenue, under which the Defendants had obtained an Order for possession of the *mouzahs*, and on which occasion the Appellant alleged he first discovered the fraud and forgeries. The Appellant sought also by the suit to set aside the above-mentioned Order of the Commissioner.

The first question which arose on the appeal was one of a preliminary nature, whether there ought not to be a remand of the suit to *India*, the Appellant contending, that there had been a miscarriage of justice by the Principal *Sudder Ameen* (*Syud Mahomed Wahedooddeen*), having recorded a single issue, namely, whether the law of limitation applied or not, and when the cause of action arose in the suit, which, although raising ostensibly a question as to the bar of the suit by limitation only, yet virtually involved the consideration of the whole merits of the suit; and by the Court proceeding, on framing such issue, to decide the case against the Appellant without giving him an opportunity of calling and examining witnesses to prove his case on

the merits. Other questions also arose, as fraud was expressly charged in the pleadings; first, whether the time of limitation did not run from the discovery of such fraud under *Ben. Reg. III. of 1793, sec. 14*, which it was submitted by the Appellant, could only be rightly decided on evidence taken in the suit; and, secondly, as not only fraud was so charged, but also the subject of the suit being real or immovable estate,—whether the Courts below were not wrong in applying the twelve years period of limitation under the above Regulation, and holding the suit barred by eighteen years having elapsed from the date of the alleged instrument of grant instead of the sixty years limitation under *Ben. Reg. II. of 1805, sec. 3, cl. 3*, which requires evidence to be gone into with reference to the proof and disproof of the alleged fraud.

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Mr. *Leith*, (with him Sir *R. Palmer, Q.C.*,) for the Appellant, and

Mr. *Pontifex*, for the Respondent, *Run Baha-door Singh*.

In this case also judgment was postponed, and afterwards delivered with the judgments in the four other cases, see *post*, p. 332.

RAJAH SAHIB PERHLAD SEIN ... *Appellant*,

AND

MAHARAJAH RAJENDER KISHORE SING, *Respondent*.*

On appeal from the High Court of Judicature at Calcutta.

15th & 16th
Feb., 1869.

An Award, under *Ben. Reg. VII. of 1822*, of the *Thakbust*, or survey authorities, in a disputed question of boundaries, having been made in 1848, a suit was brought in 1861, respecting the same boundaries, *Seemle*, that as the Award had not been contested during the three years limited by the Act, No. XIII. of 1848, it operated as a bar to the suit.

THE question in this (the fifth appeal) was by the frame of the plaint confined to one of boundary, namely, whether the lands in dispute were within the limits of the *zemindary* of *Ramnuggur*, belonging to the Appellant, or within those of *Bettiah*, the *zemindary* of the Respondent. From the view which the Courts in *India* took of the case, it substantially resolved itself into a question respecting the effect of the law of limitation, whether it operated as a bar to the Appellant's suit.

In the suit the Appellant sued the Respondent to recover 5,000 *beegahs* of land in *Tuppah Jugwan*, and to realize the collection of a *Bazaar* attached to the *Tirbanee* Fair, and which the Appellant alleged

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor :—The Right Hon. Sir Lawrence Peel.

By section 32 of Act, No. VIII. of 1859, a Plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

The pendency of an appeal to *England* to determine a question of succession is not such "a good and sufficient cause" as respects the possession of a third party to take the case out of the general law of limitations.

to be part of the *zemindary* of *Ramnuggur*. The decree of the Principal *Sudder Ameen* dismissed the suit on the ground of its being barred by the law of limitation, which decision was affirmed on appeal by the High Court.

The facts of the case are these :—

The Appellant was the *Rajah* of *Ramnuggur*. The Respondent, the *Rajah* of *Bettiah*.

In the year 1800, *Rajah Burdut Koomar Sein* was *Rajah* of *Ramnuggur*; after him *Rajah Tej Purtab Sein* (a); then *Rajah Umur Pertab Sein*, who was succeeded by the Appellant. *Maha Rajah Beer Kishwur Singh* was then *Rajah* of *Bettiah*. He was succeeded by *Maharajah Anund Kishore Sing*, after him by *Maharajah Nawul Kishore Sing*, who was succeeded by the Respondent.

In *March*, 1800, the then *Rajah* of *Ramnuggur* brought a suit against the then *Rajah* of *Bettiah*, for possession of property constituting the *Pergunnah Mujhwa*, in *Behar*, and in which *Pergunnah* the land in dispute lay, and by a decision of the Civil Court of *Zillah Sarun* the suit was dismissed, and the Respondent's ancestor declared entitled to the property.

No change in possession took place subsequently to that date, but in 1822 disputes arose between the *Rajah* of *Bettiah* and the King of *Nepaul* as to what constituted the boundary line between their respective properties, and on the 28th of *May*, 1822, the boundary Commissioner, Captain *Cooper*, declared his opinion, that the *Bechund* river was the boundary line, and that between the *Bechund* and *Sonha* rivers the land belonged to the *Rajah* of *Bettiah*.

(a) See 7 Moore's Ind. App. Cases. pp. 37, 43.

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In 1834, the then *Rajah* of *Bettiah* was in possession of the *Pergunnah* in question up to the banks of the *Bechund* river.

The *Rajah* of *Ramnuggur* died in 1834, when litigation commenced between the Appellant and the other parties as to the succession to the *Ramnuggur Raj*. Pending such litigation the *Raj* was put under the Court of Wards, and a lease granted to one Mr. *Yule*. In 1845, the Principal *Sudder Ameen* decided the suit as to the *Ramnuggur Raj* in favour of the Appellant, which decision was confirmed by the *Sudder Dewanny Adawlut* in April, 1846, and finally in 1858, on appeal by Her Majesty in Council (a).

On the 1st of *February*, 1846, Mr. *Yule*, the lessee of the *Ramnuggur* estates, filed a petition before the Superintendent of Surveys, alleging that a Fair was held yearly in *Phalgoon* (*February* and *March*), and in certain years at the time of the eclipse, and that the rent was collected for the *Rajah* of *Ramnuggur*, but that in 1253 B.E. the *Maharajah* of *Bettiah's* people had forcibly collected the proceeds of the Fair. The *Rajah* of *Bettiah* denied these statements, and claimed the lands up to the river *Bechund* as belonging to his *Raj*. The case was postponed on the ground that the question of the Appellant's title to *Ramnuggur Raj* was then pending in the *Sudder Court*.

The Appellant, as decree-holder of *Raj Ramnuggur*, joined as a party in the survey-proceeding, and was represented by his *Mooktar*, *Ishur Dutt*, and the lessee, Mr. *Yule*, having retired from the case, the proceedings took place in the presence of

(a) 7 Moore's Ind. App. Cases, 18.

the Appellant's *Mooktar, Ishur Dutt*. He tendered no evidence in addition to that produced by Mr. *Yule*, except a map and five witnesses; and the Survey Officer, having investigated the case, decided it on the 11th *February*, 1848, and ordered a particular boundary line to be marked off, so as to confirm to the Respondent the whole of the property in dispute, and on the 25th of *February*, 1848, he passed further Orders in that respect.

On the 20th of *March*, 1851, the Appellant requested the Magistrate of the *Zillah* to call for a report as to whether the *Rajah* of *Bettiah* had prevented him from receiving the collections of *Tirbanee* Fair, which application the Magistrate refused, stating that by the proceeding of the 11th *February*, 1848, the dispute as to the boundary and the Fair was settled, and if he was dissatisfied, he could refer to a Civil Court.

The Appellant, however, took no steps until the 31st of *December*, 1861, when he filed his plaint in the suit now under appeal. In his plaint he defined the boundaries which he claimed to have established, and charged collusion between Mr. *Yule* and the Respondent, in having the boundaries laid down wrongly, and he alleged possession by Mr. *Yule* and himself up to the 20th of *March*, 1851, and assigned the ouster of his possession as commencing from that day.

The Respondent by his answer denied the Appellant's allegations, as to the boundaries and possession, and submitted, that the claim was barred by the special law of limitation, under Act, No. XIII. of 1848, as well as the general law of limitation, and also that the suit decided in *March*, 1800, against the

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Appellant's Father as above-mentioned, was a bar to the suit.

The Principal *Sudder Ameen* settled the issues for trial to the following effect:—First, whether the general or special law of limitation applied? And, secondly, whether the suit was barred under the 2nd section of Act, No. VIII. of 1859, which provides, that the Civil Courts shall not take cognizance of suits previously heard and determined. As to the facts he laid down the following issues, viz.:—First, whose was the property in dispute, and in whose possession had it been? and, second, what was the boundary line? Third, upon the merits, whether the Plaintiff was entitled to possession? and further, was the Plaintiff entitled to mesne profits?

On the 30th *January*, 1862, the Principal *Sudder Ameen* (*Itrut Hossein*) made an Order dismissing the suit with costs, and in his judgment he gave as reasons for such Order, that he was of opinion, that the Plaintiff's right to sue was barred, both by the special and general law of limitation. In his judgment in commenting upon the Appellant's attempt to take his case out of the law of limitation, he said:—“Although the Plaintiff, with a view to cure the laches of limitation, represented that he had been in possession of the disputed property prior to the *Thakbust* up to 19th of *March*, 1851, and that he was put out of possession of the said land from 20th of *March*, 1851, under an Order of the *Foujdaree Adawlut*, and in support of this allegation he produced certain *Pottahs*, *Furghkutties* and *Kabooleat*, from 1251 to 1266, and in *Seaha* of the collection regarding *Terbanee Bazaar* from 1256 to 1258; but the very appearance of the papers serves as a witness

in favour of its fabrication, inasmuch as it is evident that it is engraved on old paper with fresh ink; moreover, it is not consistent with reason that after the conclusion, of *Thak* of the land in dispute in the name of Defendant on proof that of his right and title thereto, the Plaintiff should have remained in possession thereof after conclusion of *Thak*, as he was prior to it. Besides this, the Plaintiff himself stated in the *Thakbust Roobakaree*, that he was dispossessed from the *Tirbanee Mella* in 1253, and at present contrary to it, he states that he had been in possession thereof prior to the *Thakbust*; hence it is quite clear, that the Plaintiff, to cure the defect of limitation, has raised a pretended plea as to his possession. But the law of limitation is so fully applicable to the case, that it cannot be cured, but by some strong document of the Court, and not by private papers, inasmuch as the preparation of such papers rests at the disposal of the Plaintiff. Hence, in consideration of the general and special law of limitation, the present suit is not cognizable by the Court."

On appeal, the High Court at *Calcutta*, consisting of Mr. Justice *Morgan* and Mr. Justice *Sumboonauth Pundit*, on the 8th of *January*, 1864, ordered the appeal to be dismissed with costs, holding that, independently of the question, as to whether the claim was barred by the law of limitation as contained in Act, No. XIII. of 1848, the Appellant's claim was barred by the twelve years law of limitation.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

First, the Courts in *India* ought not to have

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decided that the suit was barred through effluxion of time by the general law of limitation, but ought to have heard and determined the issue on the merits. The High Court ought to have remanded the case to the *Zillah* Court, to be tried on the merits under the issues fixed and recorded.

Secondly, the Courts were wrong in their construction of the law of limitation as applicable to the case. The Appellant was within the exception provided by sec. 14 of *Ben. Reg. III. of 1793*, the general law of limitation, having been precluded from seeking redress by "a good and sufficient cause," which allows a deduction to be made of the full period during which the suit concerning the succession to the *Raj* was pending, *Rajah Enayet Hossein v. Sayud Ahmed Reza (a)*; *Troup v. The East India Company (b)*. Here the Appellant brought his suit within twelve years from the date of the final decree made on the succession suit, by which his right to the *Raj* was determined. Neither did the cause of action arise before the present suit was commenced, so as to create the bar, provided by *Ben. Reg. III. of 1793*, sec. 14. Even if the cause of action had arisen more than twelve years before the institution of the suit, and if the same was not cognizable under the exceptions contained in the above Regulation, yet it was cognizable under *Ben. Reg. II. of 1805*, sec. 3, cl. 1, being a suit for lands and permanent immovable property, which the Respondent or those under whom he claimed had required possession of by "unjust and dishonest means, and neither he nor those who held under him held quiet and unmolested possession of the lands under a title believed to be just and valid,

(a) 7 Moore's Ind. App. Cases, 238.

(b) *Ib.*, 104.

during a period of twelve years" antecedent to the commencement of the suit.

Mr. *Field*, Q.C., and Mr. *Bell*, for the Respondent.

According to the provisions of the law of limitation in *India*, as contained in Act, No. XIV. of 1859, the Appellant's right to sue was barred, as the cause of action arose twelve years before the date when the action was commenced. Independently of the question of twelve years law of limitation being applicable to the case, the Appellant had no right to sue, inasmuch as more than three years had elapsed, the case being within the meaning of sec. 1, cl. 6, of that Act, and the former Act, No. XIII. of 1848. [Sir *James Colvile* :—This case does not seem to be within the latter Act, which appears to be limited to Awards made by the revenue authorities under *Ben. Reg. VII. of 1822, IX. of 1825, and IX. of 1833.*] The *Thakbust* proceeding was an Award within the Act, No. XIII. of 1848. The limitation will not stop when once it begins to run, *Doe dem Duroure v. Jones (a)*. The case of *Rajah Enayet Hossein v. Sayud Ahmed Reza (b)* does not apply. In *Troup v. The East India Company (c)*, the sole point was, whether the words "other good and sufficient cause" in cl. 3, sec. 18, of *Ben. Reg. II. of 1803*, included "insanity."

Mr. *Leith* in reply.

Judgment was given by their Lordships with the other cases, and will be found at p. 334.

(a) 4 Term. Rep., 300. (b) 7 Moore's Ind. App. Cases, 238.

(c) 7 Moore's Ind. App. Cases, 104.

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Their Lordships having reserved the consideration of these appeals, judgment was pronounced by

The Right Hon. Sir JAMES W. COLVILE.

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Their Lordships have now to dispose of five appeals in which the same person, *Rajah Sahib Perhlad Sein*, is an actor, being in four of them the Appellant and in the fifth, the Respondent. Though the cases are not otherwise connected with, or dependent on each other, it will be convenient to state certain facts relating to the *Rajah* and his title which are common to all. He is now in undisputed possession of the *Raj* and *zemindary* of *Ramnuggur*, the title to which was in litigation from 1835 until 1858. He originally sued for them as guardian on behalf of his infant Son under a deed of gift; they were at the same time claimed by *Run Murdun Sein* as a Son of the former *Rajah*, *Umur Purtab Sein*, and by other parties under different titles. Ultimately the right of succession of the present *Rajah* as the nearest collateral heir of *Umur Purtab Sein* was declared by a decree of the *Zillah* Court, dated the 27th of *February*, 1845, and that decree was affirmed on appeal by the *Sudder* Court on the 9th of *September*, 1846. From that date the litigation was confined to the *Rajah* and *Run Murdun Sein*, who alone preferred an appeal to Her Majesty in Council, which was finally determined in the *Rajah's* favour in *January*, 1858 (a). The estate was in the possession of one of the Widows of *Umur Purtab Sein* from the time of his death in 1834, until

(a) See *Chuoturya Run Murdun Syn v. Sahub Purhulad Syn*, 7 Moore's Ind. App. Cases, 18.

February, 1840, when she died. The Collector of the District was then directed to keep it under attachment until the title to it should be determined in the pending litigation. After the *Sudder* Court's decree in 1846, an Order was made that the *Rajah* should be put into possession on giving security to abide the event of the appeal to *England*; but owing to delays in perfecting that security, he did not obtain actual possession until *June*, 1848. The security afterwards failed; the *Rajah* was unable to give fresh security to the satisfaction of the Courts; an Order was made on the 18th of *May*, 1854, that the property should again be attached by the Collector; and it remained under attachment from that time until possession was restored to the *Rajah* in 1858, upon the determination of the appeal in his favour. Having stated these facts and dates, their Lordships will proceed to deal with the several appeals in their order, beginning with that in which *Baboo Budhoo Sing* is Respondent.

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The suit out of which this appeal has arisen was brought to recover from the Appellant (the *Rajah*) possession of a *four-anna* share of certain specified property, comprising the whole, or a very considerable part of the *zemindary* of *Ramnuggur*. The original Plaintiff was a Mussulman Lady, claiming to be, at least for the purposes of the suit, the sole representative of her late Husband, *Sultan Jan*, who was the sole representative of one *Kajah Hossein Ally Khan*. After the institution of the suit she sold all her interest therein to the Respondent, who has been substituted as Plaintiff on the record, and may be taken to have all the rights in the subject

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matter of the suit which could have been successfully asserted either by *Kajah Hossein Ally Khan*, or by *Sultan Jan*.

His title is founded on a *Kowala* or Bill of sale of the property in dispute, which is admitted to have been executed to the *Kajah* by the Appellant on the 23rd of *September*, 1844, and, therefore, at a time when the latter neither was in the possession of the *zemindary*, nor had established in any Court his title thereto. The case of the Respondent is, that this Bill of sale expresses the real contract between the Appellant and the *Kajah*, which was one for the absolute sale by the former and purchase by the latter of a four-anna share of the specified property for the price of Rs. 75,000, and that that sum was actually paid down in cash when the instrument was executed.

The case of the Appellant is, that being in want of funds to carry on his suit for the *Raj* and *zemindary*, and for his own support, he applied to the *Kajah*, who agreed to make advances for those purposes on condition of having the Bill of sale executed, registered, and duly notified in the pending suit; that no part of the expressed consideration or sum of Rs. 75,000 was paid on the execution of the Instrument; and that though the *Kajah*, from time to time, advanced small sums of money, the whole amount of his advances fell far short of Rs. 75,000; that afterwards the *Kajah* absconded from *Patna* on a charge of disaffection to the Government; whereupon it was agreed between his Son, *Sultan Jan*, and the Appellant, that a Bond for Rs. 76,000 hypothecating the whole of the property in question, and not merely a twelve-anna share of it, should be substituted

for the instrument importing the absolute assignment of the four-anna share; and that, accordingly, such a Bond was executed by the Appellant to *Sultan Jan* on the 7th of *March*, 1846; but that the Rs. 76,000 was merely a nominal consideration, of which no part was paid, the real contract being one to secure moneys already advanced with future advances which *Sultan Jan* undertook but failed to make.

The questions thus raised between the Appellant and Respondent are not now litigated for the first time. In *August*, 1848, *Sultan Jan* instituted two suits against the Appellant, of which one, being almost identical with the present, was brought to recover possession of the four-anna share of the property under the title founded on the Bill of sale; and the other was for the recovery of the Rs. 76,000 purported to be secured by the Bond which he alleged to have been advanced in addition to the Rs. 75,000 said to have been paid on the execution of the Instrument of *September*, 1844.

Both these suits were dismissed by the *Zillah* Judge (Mr. *Hathorn*). He held that the Plaintiff's story in one suit as to the payment of the Rs. 75,000, and in the other as to the payment of the Rs. 76,000, was false; and in his judgment in the Bond suit he expressed an opinion, that the Appellant's account of the transactions was substantially the true one. There was an appeal to the *Sudder Dewanny Adawlut* against both decrees. The appeal in the Bond suit was absolutely dismissed. On the other appeal the Pleaders for the Respondent (the present Appellant) unfortunately raised a question as to the sufficiency of the stamps on certain documents which

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had been put in evidence; and the *Sudder* Court, avoiding the decision of the case upon its merits, directed the suit to be dismissed on that ground only; and consequently gave to the Plaintiff, *Sultan Jan*, all the advantages which a judgment of nonsuit has over a judgment for the Defendant.

The result, however, of that litigation was a conclusive decision against *Sultan Jan* in the Bond suit; whilst in the other suit a decision on the merits was passed against him in the *Zillah* Court, which was only so far qualified by the decree of the *Sudder* Court that he was left at liberty to bring a new suit. The date of that decree was the 4th of *January*, 1853.

In this state of things the present suit was instituted on the 22nd of *August*, 1856. It was brought in the Court of the Principal *Sudder Ameen*, who dismissed it with costs; and on appeal his decision, except as to costs, was confirmed by the *Zillah* Judge (Mr. *Atherton*). Both decisions proceeded upon the assumption that the Respondent's case as to the payment of the consideration of Rs. 75,000 was false, and the Appellant's true. And both Judges, conceiving that their decision on this point was sufficient to determine the suit, omitted to decide an issue which expressly raised the question whether the Bond for Rs. 76,000 of 1846 had been given in substitution for the absolute Bill of sale of 1844. According to the practice of the Courts of *India*, these two decisions were final in *India* on questions of fact, though on questions of law or procedure there lay a special appeal to the *Sudder* Court. Such an Appeal was in fact preferred. It is unnecessary to state any of the grounds of it,

except the fourth ; which is to the following effect : —“ If, for argument's sake, it be admitted, that the Defendant did not receive the full price, yet by reason of his acknowledging to have executed a *Bynamah* (Bill of sale), a decree in this suit would be just and indispensable, because the Defendant has the power to sue for the recovery of the balance of the purchase-money.”

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On that appeal the *Sudder* Court, on the 27th of *September*, 1860, made the decree which is the subject of the present appeal. Though bound by the finding of the Courts below that the Rs. 75,000, had not been paid as alleged by the Plaintiffs, the Judges who sat on the appeal nevertheless, proceeding upon a statement in Mr. *Atherton's* judgment to the effect, that the advances made to the Appellant probably amounted to about Rs. 18,000 or 20,000 in all, arrived at the conclusion, that the real and final contract between the parties was one of absolute sale and purchase, upon which there had been a partial payment of the purchase-money. They further held that, in these circumstances, a complete title to the lands passed to the *Kajah* by virtue of the Bill of sale on its execution ; and (by a supposed application of the doctrines of English Courts of Equity) that the Vendor in possession of the lands was to be treated as having only a lien for the unpaid balance of the purchase-money ; and was to be held accountable as a Mortgagee in possession for the rents and profits. They accordingly remitted the cause to the Judge, with directions “ to decide it *de novo* in his Court, on the points now mooted, or upon others which fairly arise on the pleadings.”

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Before they consider, whether the principles upon which the Judges proceeded were sound in themselves, or applicable to a transaction of this nature between Hindoos or between a Hindoo and a Mussulman, their Lordships must observe, that this application of them assumed a state of things which was not consistent with the case made by either party, and was certainly not necessarily implied by the findings of the Courts below upon the issues of fact. For even if those Courts had found that advances within a certain limit had been made, it did not follow that they were made in part payment of the consideration for a subsisting contract of sale, and not, as the *Rajah* insisted, upon a contract for security. And, indeed, the decree under appeal, by remitting the cause for trial upon the points fairly arising on the pleadings, including the undetermined issue as to the substitution of the Bond for the original contract, left this very point open.

Their Lordships, however, are of opinion, that even if this question of substitution had been determined in favour of the Respondent, the decree of the *Sudder* Court would nevertheless have been erroneous.

It is not easy to see what principle of an English Court of Equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the *Sudder* Court have come upon the facts before them. Their business was to decide the rights of the parties under the particular contract, and upon the facts found by the Courts below, according to equity and good conscience. They seem to have ruled that the effect of the execution of a Bill of sale by a Hindoo Vendor is, to use

the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the Instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case, is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review (*a*); in both of which actual possession seems to have passed from the Vendor to the Purchaser. To support it, the execution of the Bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the Vendor sells that of which he has not possession, and to which he may never establish a title? The Bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency; of which the Purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do. In the present case the Purchaser had alleged that he was in that condition, having paid the whole of the price at the date of the execution of the Instrument; but that allegation has been found to be false. Nor, if the fact had been, as assumed by the *Sudder* Court, that part of the purchase-money was paid upon the execution of the contract, and the Purchaser had come into Court alleging such part payment and tendering the balance, does it follow that he would have been entitled to a decree for specific performance; for

(*a*) These cases were *Gopeechurn Kurr v. Koroona Dasee*, Decisions, 1857, p. 225; and *Surbonarain Singh v. Maharaj Singh*, Decisions, 1858, p. 601.

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the contract sued upon is an eminently speculative, not to say a gambling, one. On the face of it, the Vendor agrees in consideration of a sum presently paid, to sell that which he has not, and may never have; and the price is presumably fixed upon a calculation of the risk undertaken by the Purchaser, at a sum far below the real value of the thing sold. But if the Purchaser under such a contract has retained part of the price for several years and until the risk has been determined by the happening of the contingency, he has *pro tanto* diminished the risk which he contracted to bear; and the Vendor has *pro tanto* lost that for which he stipulated—the present use and enjoyment of the money. The contract, therefore, has become incapable of being performed, according to the true meaning and intent of the contracting parties. Their Lordships are, therefore, of opinion, that the decree made by the *Sudder* Court upon their assumption of the facts was in every point of view erroneous, and cannot be supported.

They have now to consider not only what decree the *Sudder* Court ought to have made on the special appeal, but what ought to be the final decree in the suit; since in order to do complete justice between the parties, they have allowed the learned Counsel for the Respondent to impeach the decrees of the two Lower Courts, and to argue the whole case upon the merits. And it has been so argued very ably by Mr. *Bell*. The first and most material question is, whether it has been correctly found that the Rs. 75,000, were not paid as alleged by the Respondent upon the execution of the Bill of sale. That has been so found by three Courts in *India*; and therefore, in attempting

to disturb the finding, the learned Counsel undertook a more than ordinary burthen. He argued, however, that the two decisions in this suit gave undue weight to the former decision of Mr. *Hathorn*; and that that Gentleman's judgment had not allowed sufficient weight to the presumptions arising from the admitted acts of the Appellant in executing the Bill of sale, and the receipt for the purchase-money, and in subsequently recognizing them. Their Lordships fully concede, that though, according to the law and practice of the Courts in *India*, those acts were not conclusive evidence against the Appellant, the presumptions arising from them ought to have been allowed due weight upon the trial of the issue, whether the consideration had been paid as alleged. They observe, however, that the issue came ultimately to be determined upon the testimony of conflicting witnesses, of whom the Judge held, that some were credible and respectable, and others altogether unworthy of credit. Nor, can their Lordships say, after giving full weight to the presumptions in question, and to the other circumstances in the case, that the finding was wrong. They are disposed to believe, that the real arrangement between the Appellant and the *Kajah* was for advances to be made, from time to time; and that the form of the contract was adopted in order to evade the effect of the decisions of the Indian Courts in respect of what they consider champerty. They think, therefore, that there is no ground for disturbing the finding, that the Rs. 75,000 were not paid as alleged; and it follows, from the reasons which they have already stated, when dealing with the judgment of the *Sudder* Court, that if that finding was correct, the suit was properly decided in the Appellant's favour upon it. Their

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Lordships, however, think it right to add, that upon the evidence, corroborated as it is by the fact that the Bond hypothecated the whole, and not only three fourths of the property in question, they think that the issue as to the substitution of that security for the Bill of sale would also have been properly found in the Appellant's favour.

Mr. *Bell* pressed upon their Lordships the propriety of doing complete justice between the parties, by imposing upon the Appellant the term of repaying the advances actually made to him by the *Kajah* and *Sultan Jan*. They do not see how they can do this in the present suit, of which the dismissal will not prevent the recovery of those advances if they are still recoverable. *Sultan Jan's* proper course was to sue for the repayment of them in the Bond suit, if they were included in that security; or if they were not so included, under his general title as representative of his Father. If, in consequence of his failure to do so, or of the lapse of time, the remedy is gone, their Lordships may regret that result; but they do not see how they can supply a new remedy by imposing terms upon the Appellant, who is not in this suit seeking the aid of the Court, but is sued upon a different and inconsistent cause of action. And the difficulty of taking such a course is increased by the circumstances, that the Respondent is not the representative of the *Kajah* or of *Sultan Jan* for all purposes, but is merely the Assignee of the rights which *Furkhoonda Khanum* has specially claimed in this suit.

Their Lordships, therefore, will humbly recommend to Her Majesty that this appeal be allowed with costs; that the decree of the *Sudder* Court be reversed, and that in lieu thereof an Order be made

dismissing the special appeal with costs. The effect of this will be to affirm the decree of Mr. *Atherton*. Their Lordships are not disposed to interfere with the discretion exercised by him in respect of the costs of the suit in the Lower Courts.

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In the second appeal under consideration, *Kaleepershad Tewarree* is the Appellant, and the *Rajah* the Respondent.

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The suit out of which it arises was brought by the Respondent to set aside a *Zur-i-peshgi* deed, dated the 23rd of *December*, 1851, which purports to have been executed by him to the Appellant and his Brother, *Muddun Mohun Tewaree*, since deceased, for securing to them the repayment of Rs. 49,453, with interest, by the pledge or mortgage of fifteen *monzahs*, part of the *zemindary* of *Ramnuggur*. He also claimed *wasilat*, or the mesne profits of the property, for six years. The Respondent admits the execution of the deed, but says that it was executed as a security for the amount appearing to be due on a Bond previously executed by him in favour of the same parties in *February*, 1849; that he never received any consideration for the Bond; and that he was induced to execute both documents by his Servant, *Lalla Binda Lall*, who was acting in collusion with the *Tewarrees*.

His story as to the consideration for the Bond is, that in the course of the negotiations for procuring the security, to abide the event of *Run Murdun Sing's* appeal to *England*, which he had to give when he got into possession of the property in 1848, it was arranged that *Ranee Unopoorna*, who became his surety and pledged her property by way of security,

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should receive a *bonus* of Rs. 20,000; that the Appellant and his Brother should pay that *bonus*, and for so doing should themselves receive another *bonus* of Rs. 20,000; that the Bond was given to secure these two sums of Rs. 20,000; but that the *Tewarrees* failed to pay the Rs. 20,000 to the *Ranee*, who consequently contrived to escape from her obligations as security by means of a revenue sale and *Benamee* re-purchase of the property which she had pledged as security, and so brought about the re-attachment of the *zemindary* in 1854. His case, therefore, is, that the deed impeached was obtained from him fraudulently and without consideration.

The case of the Appellant is, that the transactions were what they purported on the face of them to be; that the Bond was given to secure advances which had been made in *Calcutta* to *Lalla Binda Lall* as the Agent of the Respondent, with his sanction and on his account; and that the *Zur-i-peshgi* deed was executed to secure a balance found on a settlement of accounts to be due in respect of the Bond debt, and some other transactions.

It is an admitted fact, that the Appellant and his Brother have been in possession of the property under the deed for several years. The Appellant's case is, that he is still in such possession; but this seems to be disputed by the Respondent.

The cause was tried by the Principal *Sudder Ameen*, who dismissed the suit with costs. His decree was reversed by the High Court, chiefly on the ground that the Defendants, the *Tewarrees*, had failed to prove that they had given consideration for the Bond; but the decree of that Court, though it directed that the *Zur-i-peshgi* deed should be set

aside, refused to award any of the *wasilat*, or mesne profits sued for, and gave no costs.

The Appellant, as the survivor of the two Defendants, appealed against the decree; and there is also a cross appeal against so much of it as rejects the claim to *wasilat*, and refuses to give the costs of the suit to the Respondent.

From the foregoing statement it sufficiently appears, that the question between the parties is one of fact, viz., which of these conflicting stories is true.

It is obvious, however, that, in the first instance, it lies upon the Respondent, who comes into Court to set aside a security solemnly executed by himself, and perfected by possession, to make out his case. And the first question to be considered is, whether he has done so, at least so far as to cast upon the Defendants the burthen of proving theirs. There has been some argument as to the rule and practice of the Courts in *India* on this point, and, in particular, upon the ruling of the *Sudder* Court in its judgment in the suit of *Sultan Jan* upon the Bond for Rs. 76,000, which has been made one of the exhibits in this cause. Upon that their Lordships observe, that if what was stated by the *Sudder* Court be read in connection with the context, it does not seem to go beyond what both sides would admit to be the law in *India*. The Appellant in that case had argued that, unless the "party sued in the Bond could establish affirmatively that his signature had been obtained under the influence of force or fraud," he was conclusively bound by that signature, and that a decree must pass against him. The Court said, in answer to this, that it had become the established practice of the Courts in *India*, in cases of contract, to require

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satisfactory proof that consideration had been actually received according to the terms of the contract; and that it had never been held there, that a contract made under seal of itself imported that there was a sufficient consideration for the agreement. The latter proposition seems to be indisputable. The former may be too loosely expressed; and the later cases cited by Mr. *Pontifex*, show that if it is to be taken as affirming that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying on the instrument the burthen of proving payment of that consideration, it is too wide. It is further to be observed, that a party who, like the Plaintiff in the case referred to, comes into Court to enforce a Bond, is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment, and of which, so far as it has yet been capable of being performed, there has been performance.

Their Lordships have no doubt that, in the latter case, the law of *India*, as of this and probably every other Country, casts upon the Plaintiff the burthen of establishing at least a good *primâ facie* title to the relief which he seeks; and they will first proceed to consider how far the Respondent has affirmatively made out the case upon which he relies.

Now, what are the facts which are either common to the cases of both parties, or are proved beyond dispute?

In 1845 *Lalla Binda Lall* was in *Calcutta* as the Agent of the Respondent, looking after the appeal in the great suit for the *Raj* which was then pending in the *Sudder* Court, and possibly other law business. He remained there after the *Sudder* Court's decree of the 9th *September*, 1846, had been made in the

Respondent's favour. The principal business which he had then to perform was to procure the security which the Respondent had to give in order to get into possession. Whilst he was so resident in *Calcutta* he certainly had some transactions with the *Tewarrees*, one of whom, *Muddun Mohun*, was or had been the *Vakeel*, or *quasi* Diplomatic Agent of the *Maharajah* of *Nepaul*; but who also carried on there some kind of *Mahajunny*, or money-lending business. On the 27th of *December*, 1847, *Ranee Unopoorna* executed the security Bond pledging her property; and on the same day entered into an agreement with *Lalla Binda Lall* as the Respondent's Agent, by which it was stipulated that for her protection her Manager should be allowed to make the *zemindary* collections from *Ramnuggur*, paying thereout an allowance to the Respondent, but keeping the surplus moneys in deposit. There is not a word in this subsidiary agreement about the *bonus* of Rs. 20,000. The Respondent seems to have objected to the arrangement so proposed, and for that, or some other reason, it was not carried out. The security itself was, in the first instance, rejected by the *Zillah* Judge, Mr. *Hathorn*; but on appeal to the *Sudder* Court, was admitted as sufficient. The delay caused by these proceedings accounts for the interval of time between the date of the security Bond and *June*, 1848, when the Respondent was actually let into possession. The proceedings put in by the Respondent show that in *September*, 1848, *Ram Chund*, and very shortly afterwards, *Ranee Unopoorna* herself, made an application to have the security Bond set aside, and *Ranee Unopoorna* and her property released therefrom. The final Order of the *Sudder* Court refusing

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to release her was, however, not made until the 19th of *February*, 1851. Thereupon she took the steps which have been already mentioned to release herself. The property which she had pledged by way of security was sold for arrears of revenue on the 11th of *October*, 1851. Notwithstanding this sale, the Respondent remained in possession of the *zemindary* until *May*, 1854. *Run Murdun Sing's* first application for fresh security was not made until *August*, 1853; fresh security, the nature of which does not appear, was then tendered, and was finally rejected in *May*, 1854. The Respondent, whilst still in possession, received from the *Tewarrees*, for at least two years, the rent payable to him under the *Zur-i-peshgi* deed. After the attachment, the following circumstances occurred. The Collector in the first instance attempted to make the gross collections from the *zemindary* irrespectively of all interests intermediate between the *Zemindar* and the *Ryots* which had been created by the Respondent. A remonstrance was made by many of those claiming such interests, though not, so far as the evidence goes, by the *Tewarrees*. The Commissioner directed that such interests should be respected pending the attachment. In consequence of this, the Collector issued an Order to the Respondent, calling upon him to specify what *mouzahs* he had given in *Mocurrery*, and under simple leases and *Zur-i-peshgi* deeds; and in answer to that Order he filed a report, stating, amongst other things, that the fifteen *mouzahs* in question were under *Zur-i-peshgi* to *Muddun Mohun Tewarree*. Thereupon the tenure and possession of the *Tewarrees* was confirmed by an *Umuldustuck* of the Collector, dated the 7th of *June*, 1855; and on the 8th of *June*, 1855, two *Mooktars* filed in the name of the Respondent a

petition in answer to some remonstrance of *Run Murdun Sing's*, affirming, among other things, the *bonâ fides* of this transaction with the *Tewarrees*, and repudiating the imputation that they were servants of the Respondent holding for his benefit. In *August*, 1856, under Orders of the Collector, confirmed by the Commissioners, the *Tewarrees* obtained a refund of Rs. 1,883. 9p. 2a., the amount of the collections deposited in the Collectorate in respect of the rents and profits of the fifteen *mouzahs* received between date of attachment and that of the Commissioner's Order above referred to. This proceeding seems to have elicited from the Respondent the first suggestion of the case now made by him. On the 18th of *October*, 1856, a petition was presented by a *Mooktar*, professing to act in his name, complaining of the Order for the refund, and setting up against the *Tewarrees* a case substantially, but not altogether, the same as that now made. The petition was referred to the Respondent, in order to ascertain whether it was really his act; and by another petition signed, not by himself, but a *Moonshee*, he adopted it generally, though he disputed the accuracy of some of its statements, and insisted that the fifteen *mouzahs* ought to be re-attached. It does not appear by any evidence what, if anything, was done on the petitions; but the *mouzahs* were certainly not re-attached. The *Tewarrees* remained in possession of them up to the time when the Respondent recovered possession of the *zemindary* in 1858; if not up to the day of the commencement of this suit.

What, then, is the case proved by the Respondent, and how far is it consistent with these established facts?

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It is not very easy to make out from the plaint and the depositions of the Respondent in support of it, a clear or consistent story touching the alleged undertaking of the *Tewarrees* to pay the *bonus* to the sureties. His case must be tried by the testimony of his witnesses, of whom *Lalla Binda Lall*, though treated as having colluded with the *Tewarrees*, and made a Defendant to the suit, is the most important, and certainly not the least friendly. He is, moreover, admitted to have been restored, whatever his former delinquencies may have been, to the Respondent's service.

According to that testimony the history of the transactions in question is this :—

Before the security Bond was drawn up, *i.e.*, before the 27th of *December*, 1847, *Lalla Binda Lall* had agreed with *Ranee Unopoorna*, or with *Ram Chund* on her behalf, to pay the *bonus* of Rs. 20,000 as soon as the Respondent, upon the acceptance of the security, should be put into possession. After the execution of the security Bond, but before it was tendered to Mr. *Hathorn*, *Muddun Mohun Tewarree*, on *Lalla Binda Lall's* application, agreed to become responsible for the payment of the *bonus* on the condition that he and his Brother should receive the further *bonus* of Rs. 20,000, to be paid out of the rents of the estate.

The undertaking, therefore, was given some time before the 18th of *June*, 1848, and ought to have been performed at that date. The Bond was executed in *February*, 1849. The witnesses who speak to that transaction all admit, that the Respondent then knew that the *bonus* had not then been paid to the surety. They do not explain why, in these circumstances,

the Bond was taken for Rs. 40,100, or bore interest from its date.

According to *Beharry Lall* and some of the witnesses, it was in consequence of the failure of *Muddun Mohun Tewarree* to perform the promise of payment which he renewed at the time of the execution of the Bond that the surety first made her attempt to be released from her security. But the documentary evidence already adverted to, shows that she had applied to be released before the Bond was executed. Again, the witnesses who speak to the execution of the *Zur-i-peshgi* deed, equally prove that the Respondent then knew that *Muddun Mohun Tewarree* had not paid the *bonus* which they say he had undertaken to pay. They allege, that he then renewed his promise to pay it, and that on the faith of that promise the *Zur-i-peshgi* deed was executed. They represent that in consequence of the non-performance of this last promise, the surety caused her pledged property to be sold at the auction sale. Yet the documentary evidence proves that it had been so sold more than two months before the date of the *Zur-i-peshgi* deed. The Respondent himself admits that he executed that deed to secure the amount of principal and interest due on the Bond. But neither he nor any of his witnesses give any explanation why interest was thus allowed upon a sum which, to his knowledge, had not been paid. Again, *Lalla Binda Lall* says, that when he finally discovered that the surety had not been paid the *bonus* and had escaped from the liability, he wrote to the Respondent not to give the *Tewarrees* possession under the deed. Yet the documentary evidence proves that they were put into possession, and that the Respondent repeatedly

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recognized them as *bonâ fide Zur-i-peshgidars* in possession, until, in the autumn of 1856, he was induced to put forward some such case as that now made.

The learned Counsel for the Respondent sought to account for the discrepancies above mentioned by various ingenious suggestions; but these were all more or less speculative, and inconsistent with the depositions of their witnesses. They also contended that their case was established by the admissions made by the Appellant in his deposition.

Their Lordships, however, are of opinion, that these admissions cannot fairly be taken to amount to more than that the Appellant and his Brother, or one of them, took some part in the negotiations with *Ram Chund* and *Ranee Unopoorna* for procuring the security; that they knew the surety was to receive a *bonus*, and believed that she did in fact receive Rs. 18,000 from *Lalla Binda Lall*, partly directly and partly through them; that is, out of the advances which they made to *Lalla Binda Lall* on the Respondent's account. If there is any doubt as to what really took place between *Lalla Binda Lall* and the *Tewarrees* on the one side, and *Ram Chund* or *Ranee Unopoorna* on the other, and in particular whether, as suggested at the Bar, there were negotiations after the sale of her property for the renewal of that particular security, it lay upon the Respondent to clear all that up by examining, as he might have done, the two last-named persons, or one of them.

Upon this evidence the Principal *Sudder Ameen* came to the conclusion, that the Plaintiff had failed

to prove his case, and dismissed the suit. The judgment of the High Court proceeds on the ground, that the Respondent had, at all events, established such a *prima facie* case as threw upon the Appellant the burthen of proving his own, and that he had failed to do so. Their Lordships cannot assent to the reasoning by which the Judges of that Court have arrived at the first of these conclusions. They seem to their Lordships in some passages to substitute speculation for proof; in others, as for instance in all that relates to *Ranee Unopoorna's* security, which they treat as subsisting down to 1854, to proceed upon a misconception of the facts proved; and in others to draw inferences from facts proved or admitted, which are not the necessary, or even the legitimate, consequences of those facts.

Their Lordships do not deny, that if it lay upon the Appellant to prove the truth of his case, he has very imperfectly done so, and that exceptions might fairly be taken to the non-production of his Books of account, and to the non-appearance of *Muddun Mohun Tewarree* as a witness. But considering that it lay upon the Respondent to establish a clear and consistent case for setting aside his own deed, and that the evidence in the cause wholly fails to do so, their Lordships are of opinion, that the conclusion to which the Principal *Sudder Ameen* came was just and proper, though the reasons which he gives for it may not be altogether satisfactory. The Order, therefore, which in this case they will recommend to Her Majesty is, that this appeal be allowed; that the judgment of the High Court be reversed; and that, in lieu thereof, an Order be made dismissing the appeal to that Court with costs; and further that the

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cross-appeal be dismissed. The Respondent must pay the costs both of the appeal and of the cross-appeal.

In the next case to be disposed of, the *Rajah* is Appellant, and *Doorgapershad Tewarree* and others, the representatives of *Muddun Mohun Tewarree*, deceased, are the Respondents.

This suit was brought by the Appellant on the 31st of *December*, 1861, to recover possession of two *mouzahs* forming part of his *zemindary* of *Ramnuggur*, from the Respondents, "in reversal of an allegation of *Mocurrery*, and proceedings of the Deputy-Collector and Collector, dated the 9th and 16th of *June*, 1856." He also claimed a refund of a small sum of money, being collections in deposit paid to *Muddun Mohun Tewarree* under those proceedings, and the mesne profits of the *mouzahs* between 1264 and 1269.

His case was, that in 1849-50 he made over these villages, or their produce, to *Muddun Mohun Tewarree*, who "lived with him," in consequence of the execution of the security Bond by *Ranee Unopoorna* "in lieu of allowance" for his rendering service; that no *Mocurrery* grant of them was ever made by him; that some time in 1857 he discharged *Muddun Mohun Tewarree* from his service for bad faith, whereupon his tenure determined; and that the moneys in deposit in the Collectorate had been paid out to *Muddun Mohun Tewarree* upon a false allegation of the existence of a *Mocurrery* grant, which the Revenue officers had never seen.

The case of the Respondents was, that *Muddun Mohun Tewarree* held the villages under a *Mocurrery*

(i. e., an hereditary tenure at a fixed rent) granted by the Appellant on 5th *Falgun*, 1256 (*February*, 1849), as a reward for services already rendered; that *Muddun Mohun Tewarree* never lived with the Appellant as a servant, in the proper sense of the term, but was the *Vakeel*, of the *Maharajah* of *Nepaul*, and resident in *Calcutta*. The substantial issues settled in the suit were, first, whether the suit was barred by the law of limitation; secondly, whether the property in dispute was possessed by *Muddun Mohun Tewarree* by virtue of a *Mocurrery* grant, or as payment for service from 1257 *Fusly*; and if by the *Mocurrery* grant, whether that grant was valid or not; and thirdly, whether *Muddun Mohun Tewarree* was a servant of the Appellant or a *Vakeel* of the *Maharajah* of *Nepaul*, residing in *Calcutta*.

The *Zillah* Judge found that the suit was barred by the law of limitation, having been instituted more than twelve years after the date of the *Pottah* set up by the Respondents, and the commencement of *Muddun Mohun Tewarree's* possession. And dealing also with the other two issues of fact, he found that the Defendants had had possession since 1256 *Fusly*, by virtue of the *Mocurrery* grant, and that that grant was genuine and valid. He, therefore, on both grounds, dismissed the suit.

Their Lordships will here observe, that it is upon the latter finding alone that this decision can be upheld. For if it be not established that *Muddun Mohun Tewarree*, in fact, held possession under a *Mocurrery* tenure, there is no evidence at all that the Appellant knew that he claimed so to hold it at any time before 1856, and his suit would be in time.

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On the other hand, if that fact be established in favour of the Respondents, they are entitled to a decree upon the merits. The nature of *Muddun Mohun Tewarree's* tenure is, therefore, the only real question in the cause.

The High Court, on appeal, affirmed the decree of the *Zillah* Judge. The grounds assigned by the Judges were, that the Appellant had failed, in their opinion, to establish the precise case set up by him; that there was no proof of any lease other than the *Mocurrery Pottah*; and, therefore, that *Muddun Mohun Tewarree* must be taken to have been in occupation of the lands, either under no engagement at all, which was highly improbable, or under the *Pottah* propounded by his heirs: and the judgment ends with this sentence—"We incline to think, that the probabilities are in favour of the latter view of the case; and as we are not satisfied that the decision of the Court below is wrong upon the merits, we see no reason to interfere with the judgment, and dismiss the appeal."

The result of these decrees, if they stand, will be to establish against the Appellant, and all who claim under him, the right of the Respondents and their successors to hold the villages in question under a perpetual hereditary tenure at a fixed rent. Their Lordships proceed to consider how far this conclusion is justified by the evidence taken in the cause.

The witnesses of the Appellant do not greatly differ from those of the Respondent as to the origin of the transaction. They differ somewhat as to the date of it, but all speak to a visit of *Muddun Mohun Tewarree* to the Appellant, and to a demand by the former of something for his support. Again, those

for the Appellant, whilst they treat what was given as being a retainer for future services, admit that it was also a reward for past services, including that of procuring the security on which the Appellant had obtained possession of his estate. It is, moreover, clear that *Muddun Mohun Tewarree* was not in the ordinary sense of the term a servant of the Appellant; that he was or had been the *Vakeel* of the *Maharajah* of *Nepaul*; that his residence was in *Calcutta*; and that whatever services he had rendered or was to render to the Appellant were rendered or to be rendered there. On the whole, the weight of the evidence on this part of the case is in favour of the conclusion, that whatever was given, was given as a reward for a past and special service; and that the gift was not a mere assignment in the nature of wages to a servant for continuing services determinable with those services at the will of the Master. The chief and irreconcilable discrepancy between the witnesses is as to the subject of the grant. Those for the Appellant say, that the *mouzahs* in question were then under lease to two *Ticcadars*, and that in answer to *Muddun Mohun Tewarree's* demand the Appellant caused letters to be written to those persons directing them to pay their rents to *Muddun Mohun Tewarree* and his Brother *Munnoo Lall Tewarree*, who was to remain at *Ramnuggur*. From one of the proceedings which will be afterwards mentioned, though not from the testimony of the witnesses, it appears that for the assignment of those rents, which amounted together to nearly Rs. 1,000 *per annum*, *Muddun Mohun Tewarree* and his Brother were to pay the Appellant a reserved rent of Rs. 81 *per annum*. And it has not un-

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naturally been asked, why if this case be true, is it not corroborated by the production of the letters to the *Ticcadars*, or by some evidence on their part, or by proof of a *kabooleat* from the *Tewarrees* undertaking to pay the reserved rent of Rs. 81.

On the other hand, the witnesses for the Respondents depose that in answer to *Muddun Mohun Tewarree's* demand of a reward, the Appellant caused a *Mocurrery* deed of the two villages to be then and there drawn in the name of *Muddun Mohun Tewarree*, and signed and sealed it himself. And the Respondents produce a deed which purports to grant to *Muddun Mohun Tewarree* a *Bekh-birt Mocurrey* of the two villages on an annual *jumma* of Rs. 136, to be enjoyed by the lessee from generation to generation. It appears to have been originally on plain paper (for the memorandum at the foot of it shows that the Respondents before filing it in this suit had to pay a penalty for getting it stamped). It was never registered; and as set out in the Record, it does not appear to bear the Appellant's signature. It was contended at the Bar that the impression of his seal is also wanting. Their Lordships cannot think that if this were really the case, both the Courts below would have omitted to comment on these material defects in the document, of which the original was before them. On the other hand, their Lordships are bound to say, that the evidence before them, so far as they have hitherto considered it, is far from being satisfactory proof of the grant of a *Mocurrery* tenure.

The Respondents have also produced the *Farki-kuttee*, or receipt. The importance of it is that the Appellant thereby purports to admit the receipt of

the rent of the villages from 1256 to 1261 (1849 to 1854) from *Munnoo Lall Tewarree, Mocurreredar*. The date is the 10th of *Bysack*, 1261. But, in their Lordships' opinion, this document and the evidence in support of it are extremely suspicious. On the face of it, it does not bear the Appellant's signature, but that of some other person. It was written on plain paper. It does not specify the amount paid, and it treats *Munnoo Lall Tewarree*, who is not named in the *Mocurrery* deed, as the *Mocurreredar*. Again it is a general receipt for rents which would in ordinary course have been paid on separate receipts at different times during four or five years. The witnesses who speak to it say, that it was signed by the *Rajah* on a settlement of accounts between him and *Munnoo Lall Tewarree*, and that the *Rajah* then requested *Munnoo Lall Tewarree* to give him the receipts or letters which he had received. If these receipts were returned, they are not produced; if they were retained, no sufficient reason is assigned for their retention. And this piece of evidence appears to be so far from advancing the Respondent's case that it throws additional suspicion upon it.

The degree in which the proceedings which took place after the re-attachment of the *Zemindary* tend to corroborate the case of either party remains to be considered.

On the 26th *October*, 1854, the Collector called upon the Appellant to make a return of the *mouzahs* of which he had given *Mocurrery*, simple *ticca*, and *Zur-i-peshgi ticca* leases. On the 13th *November*, 1854, the Appellant made a return of the *Mocurrery* tenures created by him, in which there is no mention of that which is now in dispute. He did not then

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send a list of the *ticca* leases, but promised to do so thereafter. On this the Collector passed an Order that the collections should be made from the attached estate, without regard to the tenures created by the Appellant. The persons affected by this appealed to the Commissioner, who, on the 27th of *December*, 1854, passed an Order reversing that of the Collector, and directing that such rents only as the Appellant would have been entitled to had he remained in possession should be collected by the Manager. Amongst the Appellants, whose names and claims are stated in the Commissioner's proceeding, *Muddun Mohun Tewarree* is not found; and, on the other hand, certain persons claiming to be simple *Ticcadars* of the villages in question are so found. On the 14th of *March*, 1855, the Appellant in obedience either of the original *Perwannah* of the 26th of *October*, 1854, or some subsequent *Perwannah*, sent to the Collector an *Arzee*, in which he says he has, on inquiry into his records, had prepared a detailed statement (which he forwards) of all the *mouzahs* in *Raj Kamnuggur*, containing the names of the *Ticcadars* and *Zur-i-peshgidars*, and the names of servants to whom particular *mouzahs* have been assigned in lieu of wages and other particulars. And the exhibits, copies of extracts of Settlement Book of collection for the year 1861, of the two *mouzahs* were treated by the Appellant's Counsel as extracts from that statement. Those which relate to the two *mouzahs* in question, state that *Muddun Mohun Tewarree* is the *Ticcadar* of both at *jummas* which make up the sum of Rs. 81; and further that each village is held "on conditions of service." There is in these exhibits also a statement of sums under the head of expenses, which their

Lordships feel some difficulty in explaining, or in reconciling with the hypothesis of either party. On the other hand, Mr. *Pontifex*, for the Respondents, relies strongly on the Exhibit, No. 29, which is signed by one *Lalla Binda Lall* as the *Roojoonovees* on the part of the *Rajah*, and was filed in the Collectorate on the 17th of *October*, 1854. In that document *Muddun Mohun Tewarree* is stated to be *Mocurreredar* of the two villages; and the rents payable by him amount to Rs. 81.

There are some receipts which show that the *Surbarakur* afterwards received rent from *Muddun Mohun Tewarree* as *Mocurreredar* on various occasions; but these receipts being for small sums do not show whether the total annual rent received was Rs. 81 or Rs. 136. It is further shown, and this is one of the proceedings impeached by the suit, that, on the 9th of *April*, 1855, *Muddun Mohun Tewarree*, describing himself as *Mocurreredar* of the two villages, petitioned for a refund of the rents held in the Collectorate in deposit, and named a sum of Rs. 189 as the amount of such rents under an Order of the Commissioner, dated the 28th of *August*, 1856, in which the villages are described as covered by the *Mocurrery* deed executed by the Appellant. There is, however, no other evidence that the deed now relied upon was produced before the revenue authorities; and their Lordships doubt whether an unstamped paper would have been received by any such Officer. It is further to be observed,—and this fact has been strongly pressed against the Respondents,—that, in his petition, *Muddun Mohun Tewarree* described himself as holding the two villages at *jummas* aggregating Rs. 81, under a *Mocurrery* deed,

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whereas the rent reserved by the deed now produced is Rs. 136.

Their Lordships must observe, that it is difficult, if not impossible, to extract from the proceedings last adverted to any recognition, binding on the Appellant, of *Muddun Mohun Tewarree* as *Mocurre-redar* of the villages in question under the deed now propounded, or even under any deed.

The *Jummabundee* filed by the *Roojoonovees* has been attacked, and the character of the party signing it was impugned by *Muddun Mohun Tewarree* himself in his petition in refutation of the claims of one *Lalla Binda Lall*, claiming as the *Mocurreredar* one of the *mouzahs* in question. It is not shown under what circumstances it was filed; and, in any case, it was filed before the Collector's Order of the 26th of *October*, 1854, and cannot be treated as binding on the Appellant in equal degree with the returns made by him in pursuance of that Order. And, lastly, it states that the rent of the villages is Rs. 81, and is, so far, inconsistent with the deed now produced. The Appellant cannot be held bound by the form of the *Surbarakur's* receipts, or by the proceedings for the refund, to which he was no party.

Their Lordships are not insensible to the defects in the Appellant's proof. They have already intimated that, in their opinion, the evidence preponderates in favour of the hypothesis that whatever was given was given as a reward for past services, and was not recoverable upon the dismissal of *Muddun Mohun Tewarree*, of which dismissal there is in fact no proof. They have also pointed out that the Appellant's case as to the nature of the reward might, if true, have been better proved. But even if it be

admitted that the Appellant had failed to establish the particular case alleged by him, it does not follow that the Courts below were right in leaping to the conclusion, that the Respondents had established their right to hold the lands under their *Mocurrery* tenure. It is possible that the reward to *Muddun Mohun Tewarree* may have been an assignment of the rent of the villages to him for his life, or other life interest.

The Appellant is the *Zemindar*; as such he has a *primâ facie* title to the gross collections from all the *mouzahs* within his *Zemindary*. It lay upon the Respondents to defeat that right by proving the grant of an intermediate tenure. In their Lordships' opinion, there is in the record before them no satisfactory proof of the deed relied upon, or of any right or interest in these villages beyond, at most, the lifetime of *Muddun Mohun Tewarree*.

On the other hand, they have felt that the Respondents have the concurrent judgments of the two Indian Courts in their favour; that some of the doubts thrown upon the Instrument produced might have been removed if the original Instrument, to which exceptions, which do not seem to have been taken in the Court below, have been taken here, had been before them; and that if that document does purport to bear the *Rajah's* seal or signature, no evidence to show that it is a forgery has been given.

They have, therefore, somewhat reluctantly come to the conclusion, that the safer course is to remit the cause for further trial on additional evidence. If it shall come to such a trial, the duty of the Court which tries it, will be to require satisfactory proofs of the genuineness of the *Mocurrery* deed produced;

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for it is upon that, and not upon the defects in the Appellant's case, that the right of the Respondents to hold these villages under a perpetual and hereditary tenure at a fixed rent must depend. The Order which their Lordships will humbly recommend Her Majesty to make on this appeal is, that the appeal be allowed, and the decrees of both the *Zillah* and the High Court reversed, and that the cause be remitted to the High Court with directions to retry the same or cause the same to be retried upon further evidence on the first issue of facts, and to decide the same, or cause the same to be decided accordingly. With respect to the costs of this appeal, their Lordships propose to take the course which has been followed here in similar cases, viz., to cause the costs on both sides to be taxed, and to make it part of the Order to be recommended to Her Majesty that these costs be costs in the cause to be dealt with by the High Court.

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In the fourth of these cases the *Rajah* of *Ramnuggur* is the Appellant, and *Run Bahadoor Singh* and others are Respondents. In this case, as in the last, the Appellant has brought his suit to recover two villages which the Respondents claim to hold on a *Mocurrery* tenure created by him. Their title is founded on three deeds, of which two are *Bekh-birt* deeds which purport to have been executed by the Appellant as Father and guardian of the infant Son for whom he originally claimed the *Zemindary* on the 13th of *Juyt*, 1250 (being some time in 1843-44); and the third is a *Sudruth Puttur*, or deed of confirmation, purporting to have been executed by the Appellant in his own right on the 17th of *Bhadoor*,

1255 (1847-48). The Appellant impeached these documents as forgeries; and there may have been other questions to be tried concerning them. The Principal *Sudder Ameen*, however, saw fit to settle one issue in bar in these words, viz.:—"Does limitation apply or not; and when must the cause of action be said to have arisen in this suit;" and on the assumption that the determination of the suit depended on that issue, proceeded at once to try it.

The question raised by the issue was not, whether the deeds impeached were genuine, but whether the Appellant was precluded by the law of limitation from showing that they were not genuine, and the twelve years period of limitation was to be calculated not necessarily from the date of the deeds impeached, but from the time when the Appellant having notice of them might first have brought his suit to impeach them. That time the Appellant alleged to be the 27th of *December*, 1854, in which case his suit, which was commenced on the 31st of *December*, 1861, was in time.

The Principal *Sudder Ameen*, however, found the issue against him, and dismissed the suit. His decision proceeds on the ground that on the 7th of *December*, 1858, the Appellant, by his *Mooktar*, had filed a petition before the Collector, admitting that the Respondent, *Run Bahadoor Singh*, was *Mocurreredar* of the villages in question, and assenting to the payment of some rents in deposit to him out of the Collectorate. The Principal *Sudder Ameen* held that this was an admission of the deeds impeached, and that the period of limitation was to be calculated from the date of the deeds. His decision was affirmed in effect by the High Court, and the

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question is, whether those decisions can stand. It was almost admitted at the Bar that they cannot. It is obvious, that the petition, if taken as mere proof that the Appellant knew of the title asserted by the Respondents in 1858, does not help the case, for he admits that he knew of it in 1854. On the other hand, to treat it as a conclusive admission of the genuineness of the deeds, and thence to infer that the Appellant, having executed them, must have known of their existence at their date, is to determine against him upon one piece of evidence, which may be capable of explanation, the material question in the cause, before the issue raising that question has been settled, and without giving the party the means of bringing forward all the evidence which he may have to adduce upon it.

Their Lordships, therefore, must in this case advise Her Majesty to allow the appeal, to reverse the decrees of both the Courts below, and to remand the cause for trial upon its merits. The miscarriage being that of the Judge, they think that the costs of this appeal should likewise be costs in the cause, and should be dealt with in the same manner as those of the last case.

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In the fifth and last of these appeals the *Rajah* of *Ramnuggur* is Appellant, and the *Rajah* of *Bettiah* is the Respondent.

The suit was brought by the Appellant to recover 5,000 *beegahs* of land, or thereabouts, being the whole or the larger part of the lands included between the yellow and red lines on the Map, No. 2, which is one of the exhibits in the cause; and with them the right of realizing certain profits derivable

from a Bazaar attached to the fair which is periodically held within them at a place called *Tribenec*. The question between the parties is, therefore, simply one of boundary, viz., whether the property in dispute lies within the limits of the *zemindary* of *Ramnuggur* or within those of the contiguous *zemindary* of *Bettiah*. The northern boundary of that property is the river *Bechund*, which in that locality is the frontier line between the territories of *British India* and the Kingdom of *Nepaul*.

The suit has been decided both by the Court of First Instance and also by the High Court of *Calcutta* upon the question of limitation. The plaint was filed on the 31st of *December*, 1861.

On this point of limitation the Respondent raised two distinct questions. He alleged that the boundaries between the two *Rajs* had been fixed and adjudicated by a decision of the *Thakbust* (or Survey) authority, dated the 11th of *February*, 1848; and that under Act, No. XIII. of 1848, the Appellant's suit was barred because brought more than three years after the date of that decision. He also alleged, that it was barred by the general law of limitation.

The Principal *Sudder Ameen*, who first tried this case, held that the suit was barred by both the special and the general law of limitation. The High Court entertaining some doubt as to the application of Act, No. XIII. of 1848 to the particular case rested its decision upon the general law of limitation alone.

In the course of the argument their Lordships intimated their opinion, that this case was not within Act, No. XIII. of 1848, because the operation of that Act is in terms limited to Awards made by the Revenue authorities under *Ben. Regulations VII.* of

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1822, IX. of 1825, and IX. of 1833 ; and the learned Counsel for the Respondent had failed to show that the *Thackbust* proceeding in question was an Award made under either of those Regulations. They now deem it right to observe that having, since the close of the argument, examined the Regulations more closely, they are not prepared to say that the *Thackbust* proceeding of the 11th of *February*, 1848, may not be an Award under *Ben.* Reg. IX. of 1825 within the meaning of the Act. For although *Ben.* Reg. VII. of 1822 was originally limited in its operation to what are now known as the *North-Western Provinces*, many of its provisions were, by *Ben.* Reg. IX. of 1825, extended to the Lower Provinces of *Bengal* ; and looking at the 2nd and 3rd sections of the latter Regulation, and at sections 36 to 44 (both inclusive) of the survey Manual issued by the Board of Revenue, their Lordships think it probable that Mr. *Chapman* as Superintendent of Survey, was duly invested with power to determine boundary disputes, by an Award under the 34th section of *Ben.* Reg. VII. of 1822, and may have made such an Award by the proceeding in question. The proceeding seems to have been assumed in the Courts below to be an Award within the scope of Act, No. XIII. of 1848 ; and if the determination of this appeal necessarily turned upon the applicability of that Act to the present case, their Lordships would have had that point re-argued with reference to the Regulations to which they have drawn attention.

Their Lordships, however, have come to the conclusion, that the Courts below have properly held that this suit is barred by the general law of limitation.

The Appellant comes into Court admitting upon the face of his plaint that he is out of possession, and has been so for more than ten years; and the date which he assigns to his dispossession is the 20th of *March*, 1851. Upon the issue as settled by the Court it lay upon him to establish that he was in possession up to that date; or, failing in that, that the date at which he or some former proprietor of *Ramnuggur* was last in possession is consistent with a right to institute this suit. Act, No. VIII. of 1859, sec. 32, shows, that the Plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

In the present case the Magistrate's Order of the 20th of *March*, 1851, certainly did not cause the dispossession. As far as its effect can be gathered from the extract of Report of the *Foujdary* Court of *Zillah Chumparun*, if it proves anything, it proves that the Appellant was then out of possession, and had been so, at all events, since the date of the *Thakbust* proceeding of the 11th of *February*, 1848; it does not in any degree prove that he or any former *Rajah* of *Ramnuggur* had been in possession at any former period. The Appellant has, however, produced evidence to show that in point of fact he was in possession after the date of the *Thakbust* proceeding, and up to 1851. But both the Courts below have treated that evidence as unworthy of credit; and their Lordships cannot see any grounds for holding that they were wrong in that conclusion. That there was any possession adverse to the *Rajah* of *Bettiah* after the date of the *Thakbust* proceeding seems highly improbable.

Great stress is then laid upon the Report and pro-

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ceedings of the Commissioners who in 1847 settled the frontiers of *Nepaul* and *British India*, and on the evidence given in this suit by two of the *Nepaulese* Commissioners. The effect of the official documents is merely to show, that as between the two Governments it was settled in *January*, 1847, that whatever was north of the *Bechund*, within certain limits beginning from the *Tribenee Ghât*, and extending to *Gurh Somessur*, was to be treated as *Nepaulese*, and all south of that river as British territory. It is true, that one document recommends that the *Amlah* of *Ramnuggur* should be directed not to make any collections north of the *Bechund*, and that another speaks of settling the boundary of *Ramnuggur*. But it is to be observed, that if Map, No. 2, be compared with any good general Map of *India*, and the frontier line of *Nepaul* and the course of the River *Bechund* be carefully examined, it will be found that a considerable portion of the tract south of the *Bechund*, which was the subject of discussion, lies beyond the red line on Map, No. 2, and within the admitted limits of *Ramnuggur*. And, it was far from improbable, that the Commissioners and the Resident should speak of all the lands south of the *Bechund* as *Ramnuggur* without adverting to the precise boundary-line between that and the contiguous *zemindary* of *Bettiah*, with which they had no concern. Again, the testimony of the two *Nepaulese* Commissioners proves at most that, according to their information at the time, the collections of the *Tribenee Fair*, and the lands immediately south of the *Bechund* river at that point, were in 1847 in the possession of the *Rajah* of *Ramnuggur*, who has since been dispossessed by the *Rajah* of *Bettiah*. The evidence

might be worth something if it stood alone; but when opposed by that which is to be gathered from the contemporaneous *Thakbust* proceeding, it is really worth little or nothing.

From that proceeding it appears clearly, that before *January*, 1846, the boundary between the two *zemindaries* was in dispute, and that on the 1st of *February* of that year, Mr. *Yule*, the *Ticcadar* of *Ramnuggur* under the Collector, invoked the aid of the Superintendent of Survey, complaining that in the *Fuslee* year 1253, the *Bettiah Rajah* had forcibly collected the proceeds of the Fair. The inference is, that if he had ever had possession of the lands on which the Fair is held, he had then been dispossessed. The *Bettiah Rajah*, on the 2nd of *May*, 1846, brought his case before Mr. *Chapman* (the then Deputy Collector), and asserted that the lands in question had been always part and parcel of his *zemindary*. The Map, No. 2, was then made. The *Amlah* on both sides pointed out what each side considered the boundary-line; and these are designated by the red and yellow lines upon the Map. Mr. *Chapman*, however, delayed to make any final Order in the matter before the decree of the *Sudder* Court affirming the title of the Appellant had been made. It is proved, that the Appellant then executed a *Mookternamah* in the name of *Lalla Sohur Dutt*, and appeared by that person in the subsequent proceedings; and he must be taken to have then adopted the proceedings of Mr. *Yule*, who seems, on the Appellant's appearance, to have retired from the contest. The final judgment of Mr. *Chapman* was on the 11th of *February*, 1848, as has been already stated. It held, on the proofs of possession before him, that the greater part, if not the whole, of the lands between

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the yellow and the red lines, with the right to the profits of the Fair, belonged to *Bettiah*, and settled a line of demarkation which, if not identical with the red line, at least includes the lands which are the subject of this suit within the limits of *Bettiah*.

Now, whatever be the effect of that proceeding, and whether it were, or were not, an Award under Regulation VII. of 1822, it cannot be treated as being other than a material piece of evidence upon the question of possession, now under consideration. To discredit it, their Lordships have been referred to the proceedings before the Magistrate on the 21st of *March*, 1851, and to the decree in the civil suit which was brought thereon. But these seem to their Lordships not to relate to the lands now in question, or to the effect of Mr. *Chapman's* proceeding, but to other lands, and to a question of boundary settled by some other proceeding. Their Lordships think, that this proceeding before Mr. *Chapman* establishes that the property in dispute was then in the possession of the *Bettiah Rajah*, and that there is no satisfactory evidence that it has ever since ceased to be so.

They further think, that this careful local investigation, conducted in the presence of both parties, and implying that the property in dispute had always formed part of the *Bettiah Zemindary*, casts upon the Appellant the burthen of showing by satisfactory counter-evidence at what precise time, if ever, the *Rajah of Ramnuggur* was in possession of it. And their Lordships agree with the Judges of the High Court, that this he has failed to do. There may have been assertions of right such as were likely to occur in respect of a tract of wild and jungly land on the confines of two large estates; but of an actual

legal possession, and of the determination of it at any given time, there is no proof. And their Lordships must observe, that it is a fallacy to treat the Appellant, as one of the reasons in the petition of appeal seems to treat him, as having necessarily twelve years from the date of the establishment of his title in which to enforce this claim. For he did not come in under a new title; he merely established his right to succeed to the former *Rajah* of *Ramnuggur*; and if the right of that *Rajah* to sue for the property in question was barred by the law of limitation, the right of the Appellant was also barred.

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Their Lordships, therefore, think, that the decrees under appeal may be supported on the ground stated by Mr. Justice *Morgan*, viz., that even if the Appellant was allowed to deduct the full period during which this suit concerning the *Raj* was pending, he had failed to show that he had a right of suit which accrued to him during the legal period of limitation.

If, however, it were granted that a right of action accrued to the Appellant at the date of the *Thakbust* proceeding,—and their Lordships think it impossible on the evidence to fix the dispossession at a later date,—the suit would, nevertheless, fall within the twelve years' limitation, unless the Appellant could show that he is entitled to deduct the whole or some part of the period between *February*, 1848, and the beginning of 1858. And to support this claim to deduction, he must show that during the period to be deducted, he was, in the words of the Regulation, "from good and sufficient cause precluded from obtaining redress."

Their Lordships would have great difficulty in

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affirming the proposition that such good and sufficient cause had here been shown to exist. The Appellant's title to the *Raj* of *Ramnuggur* was established in the Courts of *India* in *September*, 1846; he was put in possession of the property in *June*, 1848, though between *May*, 1854, and some day in the beginning of 1858, it was again under attachment. How can it be said that, in these circumstances, he was between 1848 and 1858 precluded from maintaining a suit for protecting his *zemindary*, and recovering lands taken from it by encroachment? It would be very dangerous, in their Lordships' opinion, to lay down as a rule, that the pendency of an appeal to *England* puts the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.

The cases in the 7th *Moore's* East Indian appeals which have been cited, are very distinguishable from the present. In *Troup v. The East India Company* (7 *Moore's* Ind. App. Cases, 104), the "good and sufficient cause" was insanity, a personal disability *ejusdem generis*, with infancy, which is specified in the Regulations. In *Rajah Enayet Hossein v. Sayud Ahmed Reza* (7 *Moore's* Ind. App. Cases, 238), the facts are complicated; but it will be found that the decision proceeded on the ground, that the title upon which the Plaintiff sued had only accrued to him on the 15th of *January*, 1842, when Her Majesty's Order in Council had determined the right of succession to be in the general heirs according to the *Sheah* law of succession, and that the suit to which the bar was pleaded had been commenced in *February*, 1852. Here the Appellant's title to *Ram-*

nuggur, subject to the appeal to *England*, was complete in 1846.

Their Lordships, therefore, must humbly advise Her Majesty to dismiss this appeal, and to affirm the decrees of the Courts below, with costs.

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KALEEPERSHAD TEWARREE

... *Appellant* ;

AND

LALLA BINDA LALL

...

... *Respondent*.*

THIS suit was instituted by the Appellant for possession of *mouzahs Koorkoorha*, with mesne profits, held under a *Zur-i-peshgi* deed, dated the 23rd of *December*, 1851, executed by *Rajah Sahib Perhlad Sein*, the *Rajah* of *Ramnuggur*, in the Appellant's

12th March,
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The High Court dismissed an appeal from the *Zillah* Court on the ground, that it involved the same question as had been decided by them in another suit

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Robert Phillimore.

Assessor :—The Right Hon. Sir Lawrence Peel.

brought by the Plaintiff in respect of the validity of a *Zur-i-peshgi* deed. The decision in the prior suit was, on appeal, reversed by the *Judicial Committee*. In such circumstances, on the appeal from the last decision coming on for hearing *ex parte*, their Lordships, with the consent of the Appellant, remitted the case to the High Court, with a declaration, that the deed was valid; and with directions that, if the Respondent did not appear within a reasonable time, to be fixed by the High Court, to dismiss the appeal from the *Zillah* Court, and, in the event of the Respondent appearing, then to hear the case on the merits.

As to costs, held, that if the Respondent failed to appear in the High Court, or if the appeal should be decided against him, the Respondent was to pay the Appellant's costs of the appeal in *England*, and the costs (if any) paid under the decree of the High Court were to be repaid to him.

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favour and *Muddun Mohun Tewarree*, his deceased Brother. The Respondent claimed to be entitled to possession under an alleged *Mocurrery Pottah* from *Rajah Sahib Perhlad Sein*, dated the 21st *Jeyt Soodee* 1259 *Fuslee*.

The facts and circumstances of the case were so immediately connected with the former case of appeal of *Kaleepershad Tewarree v. Rajah Sahib Perhlad Sein* (a), that both the *Sudder Ameen* and the Judges of the High Court rested their decisions on their previous decree in that case.

The case of the Appellant was, that *Rajah Sahib Perhlad Sein* had executed the *Zur-i-peshgi* deed, comprising fifteen *mouzahs* (including *mouzah Koor-koorha*), for the purpose of securing the payment of Rs. 49,453 and interest then due to the Appellant and his Brother. By the terms of this deed, the Appellant and his Brother were to "hold possession of the whole of the *mouzahs*," a provision which he now submitted was altogether inconsistent with the existence at the time of a *Mocurrery Pottah* in favour of the Respondent.

The Respondent, *Rajah Sahib Perhlad Sein*, in this, as in the other suit before referred to, alleged that the *Zur-i-peshgi* deed, having been executed in consideration of a promise by the Appellant and his Brother, which they did not fulfil, was invalid, no consideration having been given for the same.

It appeared that the Appellant and his Brother had made under the *Zur-i-peshgi* deed a sub-lease of the *mouzah* in dispute to one *Goolab Khan*, and had put him in possession thereof, and that while so in

(a) *Ante*, p. 282.

possession, one *Behari Lall* attempted to collect the profits of the *mouzah*. Such attempt was opposed by *Goolab Khan*, who applied to the Police authorities, when the Criminal Court of *Zillah Chumparun* directed, that if there was any claim regarding the title to the *mouzah*, a suit should be instituted under Act, No. IV. of 1840. Accordingly, *Behari Lall* and the Respondent instituted a suit under that Act against *Goolab Khan* and the Appellant and his deceased Brother. The Magistrate (Mr. *Glover*) decided the case in favour of *Goolab Khan* and the Appellant. Against such decision *Behari Lall* and *Lalla Binda Lall* appealed to the Sessions Court, and the Judge, Mr. *Robert Forbes*, being of opinion, that the *Zur-i-peshgi* deed was executed by *Rajah Sahib Perhlad Sein* in collusion with the Appellant and his Brother, for the purpose of prejudicing the rights of *Behari Lall* and *Lalla Binda Lall*, set aside the Order of the Magistrate, and decreed possession of the *mouzah* to *Behari Lall* and *Lalla Binda Lall*.

In consequence the Appellant and his deceased Brother filed a plaint against *Rajah Sahib Perhlad Sein*, *Behari Lall*, and *Lalla Binda Lall*, for possession of the *mouzah* with mesne profits.

Rajah Sahib Perhlad Sein by his answer, alleged collusion between *Lalla Binda Lall* and the Appellant, and stated that the Bond for Rs. 40,000, and the *Zur-i-peshgi* deed of the fifteen *mouzahs*, which included the *mouzah* in dispute, in substitution thereof, in question in the appeal of *Kaleepershad Tewarree* against himself, was without consideration, and fraudulent.

Lalla Binda Lall by his answer set up the validity of the *Mocurrery Pottah*.

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The Principal *Sudder Ameen* fixed the issues in the suit as follows:—First, was the deed of *Zur-i-peshgi*, which has been founded on a previous Bond, correct and valid, owing to the receipt of the *Peshgi* money and other circumstances? and are the Plaintiffs, in accordance therewith, entitled to recover possession of the disputed *mouzah*, as one of those covered by the *Zur-i-peshgi* deed, or not? Second, was the *Mocurrery Pottah* put forward by *Lalla Binda Lall*, Defendant, collusive and fabricated, and fit to be set aside, or not? and are the Plaintiffs entitled to personal possession, or by maintenance of the *Mocurrery* of *Lalla Binda Lall*, Defendant, or not?

The Appellant put in, among other evidence, the *Zur-i-peshgi* deed, in which no mention was made of the *mouzah* in question having been granted in *Mocurrery*, but, on the contrary, granted possession of the whole fifteen *mouzahs* comprised therein.

The suit came on for hearing on the 2nd of June, 1860, before *Syud Mahomed Wuhoodoodeen*, the Principal *Sudder Ameen*, who stated as his opinion, that it was “quite evident that the *Mocurrery Pottah* has been prepared through the collusion of the *Rajah* of *Ramnuggur* and *Lalla Binda Lall*, his *Mooktar*, after the execution of the deed of *Zur-i-peshgi* of the Plaintiffs, and simply with a view to cause loss to the latter; for the *Mocurrery* deed bears on it no sign of registration or of the seal of the *Cazi*, besides being originally written on plain paper, the same has been subsequently stamped;” and he proceeded, “Although from a copy of the abstract of the *Jummabundee* of the settlement of villages of *Raj Ramnuggur*, &c., up to 1261 *Fuslee*, submitted on the 17th of October, 1854, and from a copy of the returns of the *Rajah*, dated

the 13th of *November*, 1852 (1854?), and as well as from the list of lessees of the same date, it appears that the disputed village of *Koorkoorha* was given in *Mocurrery* lease for Rs. 41. Still the same are not at all trustworthy, as before a list of the *mouzahs* covered by the *Zur-i-peshgi* deed was filed by the *Rajah*, with his petition of the 14th of *March*, 1855, whereon orders were passed on the 7th of *April* of the same year, and in which list the *jumma* of this disputed village has been, without any mention of the *Mocurrery* lease, stated to be Rs. 850; so, if the *Mocurrery jumma* at Rs. 41 were valid, how could any mention of the *jumma* of Rs. 850 have been made before that date? The date of the *Mocurrery* lease is, apparently, prior to that of the *Zur-i-peshgi*, but at the same time a denial on the part of the *Rajah* of the existence of this *Mocurrery* tenure, is clear from a copy of his petition of the 18th of *June*, 1855. From the decision of the Magistrate of *Chumparun*, it is also seen that *Lalla Binda Lall* and *Behari Lall* declare themselves to be in possession of the disputed village under the *Mocurrery* lease; now then, as *Behari Lall* is himself an attesting witness to the *Zur-i-peshgi* deed in the names of the Plaintiffs, in which the *jumma* has been, without any mention of the *Mocurrery* lease, stated to be Rs. 850, so there is no doubt that this *Mocurrery* lease has been fabricated after the execution of the *Zur-i-peshgi* deed on behalf of Plaintiffs " and decreed in favour of the Appellant, with mesne profits and costs.

Against this decree the Respondent appealed, and on the 21st of *May*, 1863, Messrs. *Steer* and *Seton-Karr*, two of the Judges of the High Court,

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gave judgment. They did not go into the merits of the case, but reversed the decree of the Principal *Sudder Ameen* on the following grounds:—"Having held in the other suit (a), that the present Plaintiffs have no further right to the fifteen villages of which they held the lease; and this suit being to cancel a *Mocurrery* in one of those villages, and to get possession of it, we must decree on the appeal of the *Mocurreredar* that the suit ought to have been dismissed."

The Appellant alone brought the present appeal, his Brother having died pending the appeal to the High Court.

The Respondent not having appeared, the appeal was heard *ex parte*.

The Appellant, by his case, submitted that the validity of the *Mocurrery* lease, as against him, was not supported by trustworthy evidence; but, on the contrary, was inconsistent with the facts disclosed by the evidence. That even if the *Mocurrery* lease was executed prior to the *Zur-i-peshgi* deed, it was executed without consideration, and ought consequently to be declared void as against the Appellant's deed, executed without notice for valuable consideration, and that the Appellant's title, in priority to and without notice of the *Mocurrery* lease, was sufficiently proved.

Mr. *Pontifex*, for the Appellant, was stopped.

The Right Hon. Sir JAMES W. COLVILE.

The only question is, whether their Lordships can decide this appeal without remitting it back to the

(a) *Ante*, p. 282.

Court below, as the case substantially involves the same question, and turns on the decision of their Lordships just pronounced in the case of *Kaleepershad Tewarree v. Rajah Sahib Perhlad Sein (a)*. Can their Lordships decide the case in its present form on its merits? If we are not in a condition to try the question, the appeal must either stand over or be remitted, or we can recommend Her Majesty, that the decree appealed from be reversed, subject to notice being given to the Respondent in *India*.

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Minutes were then agreed to, which are embodied in the following Order in Council:—

“It is hereby ordered, that the decree of the High Court of Judicature, at *Fort William*, in *Bengal*, of the 21st of *May*, 1863, be reversed, and the cause remitted to the High Court, with a declaration, that the *Zur-i-peshgi* deed, alleged to have been granted by the *Rajah* of *Ramnuggur* to the Appellant and his Brother, is a valid instrument, and the High Court is hereby directed, in case the Respondent does not appear within a reasonable time to be fixed by the High Court, to dismiss his appeal from the *Zillah* Judge of *Sarun* to the High Court, with costs, and if the Respondent does so appear, then the High Court is to hear and determine the appeal on its merits, and in case the Respondent shall fail to appear in the High Court, or in case the appeal shall be decided against him, then the Appellant's costs of this appeal are to be paid by the Respondent, and the costs (if any) paid under the decree of the High Court of the 21st of *May*, 1863, are to be repaid.”

(a) *Ante*, pp. 282, 311.

CHOWDRY PUDUM SINGH ... *Appellant*;

AND

KOER OODEY SINGH ... *Respondent.**

*On appeal from the late Sudder Dewanny Adawlut,
North-Western Provinces, Agra.*

16th & 18th
Feb., 1869.

Suit by *A.*,
one of the co-
heirs of *H.*,
against *B.*, to
recover the
whole of *H.*'s
real and per-
sonal estate
in *B.*'s pos-
session, as
the alleged
adopted Son
of *H.* There
were other
persons en-
titled with *A.*
to share in

THIS was a suit in the nature of an ejectment, brought by *Chowdry Mohur Singh*, deceased, the Father of the Respondent, against the Appellant, to obtain possession of the whole of the real and personal estates of one *Hem Singh*, who died leaving a Widow, but no issue.

The nature and facts of the case and pleadings in the suit are so fully stated in the judgment

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

the succession to *H.*'s estate, who were not made parties to the suit. The *Sudder Court* at *Agra* held, that *B.* had failed to establish his title as adopted Son of *H.*, but declared that, *A.* was entitled to succeed, as one of the heirs of *H.*, to a share of his estate, and decreed him the whole estate as sought by the plaint. Such decree, on appeal, so far as it declared that *B.* had failed to establish his title as adopted Son of *H.*, confirmed; but as the decree was manifestly wrong in decreeing to *A.* the entire estate of *H.*, and there were no materials to enable the *Judicial Committee* to vary the decree, so as to limit it to the share of the estate to which *A.* had established his right by inheritance, the decree was reversed, and the cause remitted to *India* for inquiries as to the amount of his share.

An adoption may be made by a Widow under an authority conferred upon her for that purpose by her Husband, but such authority must be strictly carried out, as the adoption is for the benefit of the deceased Husband and not the Widow alone.

Adoption by the Widow alone does not, by Hindoo Law, give the adopted

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delivered by their Lordships, that it is unnecessary to set them out.

The principal question in the Court below and upon appeal, was the title of the Plaintiff, a cousin, who was one of the co-heirs of *Hem Singh*, to the entire estate of *Hem Singh*, he contending that the possession by the Appellant of *Hem Singh's* estate was illegal, as he had never been adopted in *Hem Singh's* lifetime, nor had *Hem Singh* given permission to his Widow to adopt him. The Appellant relied upon his adoption by the Widow under a power from her Husband. He also set up a Will made in his favour by the Widow of *Hem Singh*. The *Sudder* Court at *Agra* held, that the Appellant had not established his claim as adopted Son, and by the decree declared that the Appellant was, as one of the co-heirs of *Hem Singh*, entitled to a share of *Hem Singh's* estate, and decreed him the entire estate in the terms of the prayer of the plaint.

Upon appeal to the Privy Council,

Mr. *Leith* appeared for the Appellant, and

Sir *R. Palmer*, Q.C., and Mr. *J. D. Bell*, for the Respondent.

The following points were raised and argued:—

First, that the suit was defective for want of parties, as there were other heirs of *Hem Singh*, and that the decree of the *Sudder* Court was un-

child (even after the Widow's death) any right to property inherited by her from her Husband.

Adoption, being a matter of fact, must be strictly proved, and the party who claims as adopted Son must establish by evidence (1) the authority given by the Husband to the Widow to adopt a Son to him, and (2) his actual adoption by the Widow as her Husband's Son.

Under circumstances raising a strong presumption against an alleged adoption, such adoption held not to have been made.

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certain, defective, and incapable of being given effect to, as the Plaintiff was not the sole heir of *Hem Singh*, whereas the decree gave him the whole estate, and not his aliquot share.

Secondly, upon the effect of the evidence as to the Appellant's alleged adoption by *Hem Singh's* Widow, the Appellant submitted, that the general presumption of Hindoo Law with respect to adoption, and the probabilities arising out of the state and condition of *Hem Singh's* family, was in his favour. *Huradhun Mookurjia v. Muthoranath Mookurjai (a)*, and *Katama Natchier v. The Rajah of Shivagunga (b)*, were cited and relied on.

14th March,
 1869.

Their Lordships' judgment was pronounced by—
 Sir JAMES W. COLVILE.

This is an appeal from a decree of the late *Sudder Dewanny Adawlut* at *Agra*, reversing a decree of the Principal *Sudder Ameen* of *Zillah Meerut*, made in favour of the Appellant.

The suit was instituted by *Chowdry Mohur Singh*, the Father of the Respondent (who died while the suit was pending), to recover possession from the Appellant of the whole of the movable and immovable property formerly belonging to *Hem Singh*, deceased, a cousin of the Plaintiff, consisting of ancestral property, and of property acquired and amassed by *Hem Singh* and by his Widow, *Khoosal Kooer*, out of the proceeds of his ancestral estate.

The suit was instituted after the death of the Widow, *Khoosal Kooer*, the Plaintiff's claim being founded on his right of heirship to *Hem Singh*. It

(a) 4 Moore's Ind. App. Cases, 414.

(b) 9 Moore's Ind. App. Cases, 539.

appears by the plaint and a genealogical Table annexed to it, that there were other persons descended from the same common ancestor as the Plaintiff, who would have an equal right with him to a share in the succession of *Hem Singh*. The Plaintiff, in his plaint, assigns as a reason for not including them among the Defendants, that "they had not possession of the property in suit, and that if they thought they had any right or interest in the matter, they could proceed against the Plaintiff at their option."

The plaint states, that after the death of *Khoosal Kooer* the Managers of the estate presented a spurious Will to the Collector, setting forth the Defendant as her adopted Son, and by that means he contrived to get possession of the estate. And it alleges, that the Defendant is not the adopted Son of the deceased Widow, *Khoosal Kooer*, and that she had no power to adopt a Son as long as the Plaintiff was alive. That the Defendant does not belong to the family of which *Khoosal Kooer* and Plaintiff are members, and that he is merely the foster Son of one *Suhej Kooer*. That it is not true that *Khoosal Kooer* ever executed a Will, and, had she done so, a Will made on the point of death would not be legal.

The Defendant by his answer to the plaint, states that the villages and properties claimed belonged to *Hem Singh*, the sole and absolute proprietor, though some of the properties were purchased after his death by his Widow, *Khoosal Kooer*. That *Hem Singh* had no issue, and, therefore, he selected the Defendant, who was of the same family and sect as himself, and was then but twelve months old and the youngest child of his parents, with their consent, to be his

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adopted Son. That he received the Defendant into his arms, and brought him up as his own Son, and authorized his Wife, in case the rites of adoption were not performed during his own lifetime, to perform them after his death, declaring that he had constituted the Defendant proprietor of his entire estate, as though the Defendant were his own Son. That accordingly, when *Hem Singh* died, *Khoosal Kooer* carried out his injunctions, and performed the ceremony of adoption of the Defendant. The Defendant further states in his answer, that the property left by *Suhej Kooer*, Aunt of *Hem Singh*, also came into his possession in consequence of his being *Hem Singh's* adopted Son. And that, although being the rightful heir and successor to the estate, he did not need the support of a Will, yet that, as a matter of precaution, *Khoosal Kooer* executed a Will in his favour. That he does not rest his title upon that Will, but bases his claim as lawful and absolute proprietor of the estate on his hereditary rights.

Issues were framed by the *Zillah* Court which were calculated to raise various questions, but the *Sudder* Court, in their judgment upon appeal from the *Zillah* Court, after observing that the issues were very badly drawn, said, "The pleadings show that the only point for determination was, whether the Widow, *Khoosal Kooer*, adopted the Defendant, *Pudum Singh*, by desire of her Husband, *Hem Singh*."

This single question appears to have been the one to which the greater part of the evidence in the suit was directed, and upon which alone the judgment in the *Zillah* Court, and also in the *Sudder* Court, proceeded.

The Principal *Sudder Ameen* dismissed the Plaintiff's claim with costs, being of opinion, that it was clearly proved by the testimony of the Defendant's witnesses,—most of whom, he said, were respectable and trustworthy persons,—that *Hem Singh* adopted the Defendant, *Pudum Singh*, when he was twelve months old, and gave authority to his Wife, *Khoosal Kooer*, to complete the formal ceremony of adoption, and that it was further proved by the testimony of the same witnesses, that after *Hem Singh's* death, *Khoosal Kooer* went through the ceremonies of adoption in respect to the Defendant.

Upon appeal from this decree to the *Sudder Court*, that Court, upon the documentary evidence in the suit, arrived at a conclusion directly opposed to that of the Lower Court, considering that it entirely excluded the presumption of the truth of the Defendant's story, that the Widow adopted him at the end of 1836 by desire of her Husband.

They, therefore, held, that the Plaintiff was entitled to succeed to a share in the property in suit as one of the next of kin of *Hem Singh*, and decreed in favour of the appeal and of the Plaintiff's claim, and reversed the decision of the Lower Court with costs.

The decree, which was drawn up in conformity with this judgment, embraced the whole of the property included in the Plaint, although the Court held, that the Plaintiff was entitled only to a share in the succession as one of the next of kin of *Hem Singh*. The decree, therefore, cannot be maintained, and the evidence furnishes no materials to enable their Lordships to vary it so as to limit it to

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the share of the property to which the Plaintiff has established a right. It is possible, also, the some portion of the property claimed may have belonged to *Khoosal Kooer* in her own right, and may have passed to the Defendant by her Will, the validity of which, as to such property, the Plaintiff can have no right to question.

But although the decree in favour of the Respondent for the whole of the property claimed by him cannot stand, yet as he would not be entitled even to a share in the succession to *Hem Singh* if there were a valid adoption of the Appellant, their Lordships have felt it their duty to determine that question (the most important if not the sole question dealt with by the Courts below) in order to prevent further litigation respecting it.

The question as to the adoption of the Appellant is one entirely of fact. There is no doubt, and indeed it was fully admitted, that adoption might be made by a Widow under an authority conferred upon her for that purpose by her Husband. Of course, such authority must be strictly pursued, and as the adoption is for the Husband's benefit, so the child must be adopted to him and not to the Widow alone. Nor would an adoption by the Widow alone, for any purpose required by the Hindoo Law, give to the adopted child, even after her death, any right to the property inherited by her from her Husband.

In order, therefore, to establish the validity of the adoption in this case, it was necessary for the Appellant to prove :—

First. The authority given by *Hem Singh* to his Wife to make the adoption ; and

Second. The actual adoption by *Khoosal Kooer* of the Appellant as the Son of *Hem Singh*.

The Appellant proved, by several witnesses to whom the Principal *Sudder Ameen* gave credit, but upon whom the *Sudder Court* placed no reliance, that the Appellant was the younger Son of *Zalim Singh*; that *Hem Singh* asked, and obtained permission of *Zalim Singh* and his Wife, to adopt the Appellant. That *Hem Singh* took away the Appellant, then a child of twelve months old, and carried him to his house, and placing him on the lap of *Khoosal Kooer*, said, "I have brought you this child to adopt as our Son." That a year after, *Hem Singh* said to *Khoosal Kooer*, "If I live long enough, I shall go through the ceremony of adopting the child myself; if not, I authorize you to perform the ceremonies of adoption as soon as he is five years old;" and that *Hem Singh* died a year after giving this authority. The witnesses also proved, that when the Appellant had attained the age of five years, *Khoosal Kooer* went through all the ceremonies of adoption which they minutely described. It does not appear by the evidence of any of the witnesses, that *Khoosal Kooer* declared at the time, that the ceremonies were performed for the purpose of the adoption of the Appellant as the Son of *Hem Singh*, in pursuance of the authority which he had given her. One of them, on the contrary, says that "*Khoosal Kooer* adopted *Pudum Singh* as her own Son, at the request of *Hem Singh*."

If the adoption of the Appellant as the Son of *Hem Singh* had really been completed by *Khoosal Kooer*, his name ought to have been substituted for

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hers in the Books of the Revenue Collector, as the property of *Hem Singh* would, by the act of adoption, have been divested from *Khoosal Kooer*, and would have vested in the Appellant as his Son and heir. Some of the witnesses say, that after performing the ceremonies, *Khoosal Kooer* ordered her *Dewan* to give notice of the adoption to the Collector. Either this Order was never given, or it was not obeyed, for it does not appear that any change was made in the entry in the Collector's Books; and *Hem Singh's* property continued to be registered in *Khoosal Kooer's* name down to the time of her death, which took place at least ten years after the Appellant had attained his majority. But *Khoosal Kooer* caused herself to be entered in the Books of the *Canoongoe*, or Record Keeper, of the village of *Koorja*, as the guardian and protector of *Pudum Singh* (the Appellant).

Now, if this were intended as the record of the fact of an adoption which had divested the property of *Hem Singh* from his Widow, and made her merely guardian of the minor adopted Son, it seems extraordinary, after such a complete lawful adoption as the witnesses represent, that *Khoosal Kooer* did not take the most effectual mode of recording it, by pursuing the regular course of substituting the Appellant's name for her own in the Revenue Collector's Books. In the absence of any such record, the instances of the occasional description of the Appellant as the Son of *Hem Singh* are of no value. The Principal *Sudder Ameen* laid great stress upon a supposed entry of the Defendant's name as under the guardianship of *Khoosal Kooer* in the *Khewut* for proprietary Register of 1256 *Fuslee*, which he said

would not have been made if the Appellant were not the adopted Son of *Hem Singh*. Upon turning, however, to the only *Khewut* printed in the proceedings of the date named, it will be seen that there is no entry at all as to guardianship, but under a column headed "Name of *Puttidar*" the Appellant is entered as "*Pudum Sing, Son of Hem Singh.*" In a statement of mutation of names of *Lumberdars* and *Puttidars*, however, in which *Pudum Singh's* name is entered in the column of *Puttidars*, but not as the Son of *Hem Singh*, there is the signature of *Khoosal Kooer*, with the addition of the words "guardian of *Pudum Sing;*" and it is probable that the Principal *Sudder Ameen* mixed up the *Khewut* and this document together in his mind. It is the only one of similar documents in evidence which is signed by *Khoosal Kooer*, and there is nothing upon the face of it to show that it relates to *Hem Singh's* property.

The description of *Pudum Singh*, as the Son of *Hem Singh*, in the first power of attorney executed by him and *Khoosal Kooer*, is of little importance, as the parties were at liberty to describe themselves as they pleased in this private instrument; and the same observation applies to the entry of *Hem Singh's* name as the Father of the Appellant in the income-tax receipts, as most of the particulars inserted in the different columns could only be known to and filled in by the party by whom the tax was to be paid. The Appellant, in support of the evidence of an adoption, relied upon a proceeding by *Khoosal Kooer* on the 25th of *March*, 1836, when she presented a petition at the office of the Deputy-Collector of Revenue, describing herself as the Widow of

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Hem Singh, and praying that the name of *Pudum Singh* might be added to her own in the *Zemindary* registers of certain villages. The *Sudder* Court observed upon this proceeding that "the joint entry of the Widow's and *Pudum Singh's* names was in some respects inconsistent with the averment of his adoption, which would have placed the two in the position of parent and child, or guardian and heir." And, they added, "We find that the application referred to property acquired by the Widow after her Husband's (*Hem Singh's*) death, and which is not in suit in the present case."

There is some doubt as to the accuracy of the statement, that the villages named in the petition of *Khoosal Kooer* are not in suit in this case, as it was pointed out in the course of the argument that most of them are included in the plaint. But there still remains an objection to the use of this proceeding in proof of the adoption of the Appellant, which was slightly adverted to by the Court. It must have preceded the alleged ceremony of adoption. The Appellant was twelve months old at the time of the commencement of the intended adoption. *Hem Singh* lived a year afterwards, and died on the 22nd of *October*, 1834. The ceremonies of adoption are stated to have been performed by *Khoosal Kooer* when the Appellant was of the age of five years, which, according to the dates, he could not have been on the 25th of *March*, 1836, when the petition of *Khoosal Kooer* was presented.

All the acts of *Khoosal Kooer* with respect to *Hem Singh's* property appear to have been dictated by a desire to continue to be *Zemindar* during her life, and to secure the succession to it after her death to

the Appellant. She may have attempted at the same time to reconcile her continued possession with the alleged wishes of her Husband in favour of the Appellant.

The documentary evidence produced on the part of the Respondent tends much more strongly to throw suspicion upon the veracity or the accuracy of the witnesses who speak to the fact of the adoption by *Khoosal Kooer*, as it is wholly inconsistent with the idea of any such adoption having taken place.

It must always be borne in mind, that *Khoosal Kooer* remained the registered owner of *Hem Singh's* property for the whole of her life. In addition to this circumstance, there are acts and declarations of *Khoosal Kooer* which cannot be reconciled with the fact of an adoption of the Appellant. Stress was laid by the Counsel for the Respondent on a statement made by *Khoosal Kooer* in a suit instituted by her against *Tara Singh's* claiming the succession as heir to the whole of her Husband's property, that, "*Hem Singh*, died without leaving any issue male or female." It was observed that this action, which was brought on the 23rd of *March*, 1836, was contemporaneous with the above-mentioned petition of *Khoosal Kooer* to have the Appellant's name added to her own as the proprietor of certain villages, which was presented on the 25th of *March*, 1836. According to what has been already remarked, this must have been prior to the time at which the alleged adoption took place, and, therefore, it was then strictly true that *Hem Singh* had died without leaving issue. But yet it is extraordinary, if *Khoosal Kooer* had any intention of carrying out her Hus-

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band's wishes with regard to the Appellant, that no mention whatever should have been made of the authority to adopt, and of her purpose to adopt the Appellant when the proper period arrived, in a suit which seemed peculiarly to require a true and full account of the destination of *Hem Singh's* property. Again, in 1841, long after the alleged adoption, *Hem Singh*, and *Tara Singh*, his Brother, having been joint proprietors of a village, and upon the death of *Hem Singh*, *Khoosal Kooer's* name having been entered in the register instead of his, and upon the death of *Tara Singh*, the name of his Widow, *Meha Kooer*, having been substituted, upon the death of *Meha Kooer*, *Khoosal Kooer* caused her name to be recorded as proprietor of the village, which, if there had been an adoption of the Appellant as heir of *Hem Singh*, he would have been.


Although the Appellant does not rest his title to *Hem Singh's* property upon the Will of *Khoosal Kooer*, yet it is impossible to pass over the fact of her having made this Will or to omit all notice of the contents of it. Although, according to the case of the Appellant, *Khoosal Kooer* had failed in her duty by not divesting herself of *Hem Singh's* property upon the completion of her adoption, yet as that act made him heir to his adopting Father, no strength could be added to his title by the Will of the Widow. In consequence, however, of her remaining in possession of *Hem Singh's* property, doubt would probably be cast upon the fact of the Appellant's adoption, and, therefore, her declaration of her having performed the ceremonies in pursuance of her Husband's authority would have been useful as evidence; but instead of describing the Appellant

as the adopted Son of *Hem Singh*, the Will of *Khoosal Kooer* is in these terms:—"As *Kooer Pudum Singh*, the adopted Son of your Petitioner, has been in possession of your Petitioner's estates for a long period, and as the Petitioner has no other heir or successor but him, and as the Petitioner has retained him in possession during her lifetime, and he carries on all the business of managing the villages and *zemin-daries*, &c., therefore, the Petitioner prays, that the name of *Pudum Singh* be substituted for her own name as proprietor of all the *zemindary* and *Malguzary* villages and *maafee* lands of her estate, and *Pudum Singh* may be recognized as the owner of all her real and personal property."

Upon the death of *Khoosal Kooer*, reports were made of the facts connected with her death by the *Canoongoes* of the different *mouzahs*, in which *Khoosal Kooer* was styled either *Zemindar*, or *Zemindar* and *Lumberdar*, and all of them stated the conditions of settlement of *mouzahs* in these terms:—"Whomsoever *Khoosal Kooer* may constitute her heir in her lifetime, the same shall be entitled to the office of *Malguzary* after her death."

The *Putwary's* memorandum on the death of *Khoosal Kooer* is as follows: "The said *Mussumat* departed this life by the will of God on the 17th of *December*, 1861, &c., and left *Kooer Pudum Singh*, her adopted Son, aged thirty-one years, as the heir and successor to all her property."

Pudum Singh, being of the age above mentioned at the time of *Khoosal Kooer's* death, it is not likely that he had never heard of his having been adopted as the Son of *Hem Singh*, if such a ceremony had taken place. And, if he had been

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informed of the fact, it was to be expected that, although he had patiently submitted to *Khoosal Kooer's* usurpation of his property during her life, he would have seized the earliest opportunity of asserting his rights as the heir of *Hem Singh*. But it appears, that this was not the course which he pursued, nor the title by which he claimed the succession. The report of the *Tehseeldar* of *Koorja* on the succession to *Khoosal Kooer* states, "that the *Putwary* and *Canoongoe*, in their respective reports of the death in question, have mentioned *Kooer Pudum Singh*, her adopted Son, as the heir to the property of the deceased *Mussumat*. And that *Pudum Singh* had put in a petition praying that his name might be recorded as *Lumberdar* and *Puttidar* in place of that of *Khoosal Kooer*, deceased, as there was no other heir but himself."

The Counsel for the Appellant endeavoured to explain away the effect of this claim as heir of *Khoosal Kooer*, by the suggestion that, in thus claiming, the Appellant had been misled by the reports of the *Canoongoes* as to the right of succession to the property held by *Khoosal Kooer*. But (as already observed) if the Appellant really had a title to the property as the heir of *Hem Singh*, it is impossible to believe that he could have been ignorant of it; and his claim to the succession in a different character is almost conclusive against the attempted proof of a lawful adoption of the Appellant as the Son of *Hem Singh* by *Khoosal Kooer*, and consequently against the truth of the story told by the witnesses upon the subject.

Their Lordships, therefore, agree with the *Sudder Court*, that the Appellant has failed to prove that he

was lawfully adopted as the Son of *Hem Singh* by *Khoosal Kooer*, in pursuance of authority conferred upon her for that purpose by her Husband; and that he has, therefore, no answer to the claim of the Respondent to a share of the succession to *Hem Singh's* property. But as the Court has made a decree which gives the Respondent the whole of *Hem Singh's* property, when he is entitled only to a part, that decree must be set aside.

Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare, that it has been established between the parties to the suit, that the Appellant is not the duly adopted Son of *Hem Singh*, and that on the death of *Khoosal Kooer*, *Mohur Singh*, the Father of the Respondent, and the other heirs in equal degree then living, became entitled to inherit the estate of *Hem Singh*, of which his Widow died possessed. And they will recommend to Her Majesty, that with this declaration the cause be remitted to the High Court of *Agra*, to make such inquiries as shall be necessary to ascertain what share of the estate of *Hem Singh* the said *Mohur Singh* was entitled to, and what part of the property claimed by the plaintiff was the estate of *Hem Singh*. And as the Appellant has succeeded in proving the invalidity of the decree, although he has failed in his opposition to the Plaintiff's title, their Lordships will further recommend that each party bear his own costs of the appeal.

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AND	
GIRDHAREE LALL <i>Respondent ;</i>
AND	
RAJAH ENAYET HOSSAIN <i>Appellant,</i>
AND	
SUMEERCHAND and others <i>Respondents.*</i>

*On appeal from the High Court of Judicature
at Calcutta.*

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A. died in 1841, having executed a deed of gift in favour of his eldest Son B., and also a Will, making B. Executor, and directing certain allowances to his Widow and children out of his estate. Disputes arose among A.'s heirs respecting these instruments, which led to

THESE appeals, substantially involving the same question, the operation of the *Bengal Regulation of Limitation*, III. of 1793, sec. 14, as a bar to the suits, were heard together.

With respect to the first appeal, the facts were these :—

Rajah Deedar Hossain, the Father of the Appellant, a Mahomedan, died in the month of *Aughan*, 1249 *Moolky*, leaving a Widow, five Sons, and several Daughters. The Appellant was the eldest

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a summary suit under Act, No. XIX of 1841, in which B. was, in 1842, put in possession of the whole of A.'s estate. Afterwards the members of A.'s family acquiesced in the deed and Will, renounced their claims as heirs, and received certain stated allowances given by the Will out of A.'s estate. In 1846, C., the youngest Son of A. in consideration of advances made to him, executed a Bond, and was afterwards sued by

Son, and one of the younger Sons was named *Bahadur Hossain*.

Prior to his decease, *Rajah Deedar Hossain* executed a *Hebah-bill-ewas*, or deed of gift, bearing date the 26th of the month of *Shabun*, 1255 *Hijree* (corresponding with the 19th *Kartick*, 1247 *Moolky*), and thereby, in consideration of Rs. 10,000, gave one-third of his immovable property, and the whole of the movable property specified in the schedule thereto, to the Appellant, and after acknowledging that he had received the consideration-money, put the Appellant into possession.

Rajah Deedar Hossain also executed a Will of even date with the deed of gift, and thereby constituted the Appellant his Executor and representative, and the Testator directed, that out of every kind of property belonging to him (after deducting one-third) of which he had made the deed of gift to the Appellant, the remaining two-thirds should be divided into three portions, whereof one portion was to be applied by the Executor for charitable and religious purposes, and the remaining two-thirds, after payment of debts, the Executor was to pay to the Testator's heirs, male and female, and salary-holders, in certain proportions as therein mentioned.

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the Bond-holder, which suit resulted in a decree against him, and ultimately an execution sale under such decree in 1853. The decree-holder sued C. in 1857, seeking to make his share in A.'s estate liable, as in case of an intestacy:—Held, by the Judicial Committee, reversing the decree of the High Court (1) that the burthen was on the decree-holder to show circumstances to take the case out of the operation of the Regulation of Limitations; and (2) in the absence of such evidence, that the time began to run in 1842, when B. was put in possession, and consequently that the suit was barred by *Ben. Reg. III. of 1793*, sec. 14.

Held, further, with respect to the operation of that Regulation, that there is no distinction between a person claiming under an execution sale and one who claims under an assignment or conveyance.

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At the date of the execution of the deed of gift, the *Soorjapoor Zemindary* was under attachment, and collections were made by a *Surburakar*.

After the death of *Rajah Deedar Hossain*, the Appellant entered into possession of the entire estate. But three of *Rajah Deedar Hossain's* Sons and four of his Daughters, for some time disputed the validity of the deed of gift and Will, and threatened to act in opposition to the terms thereof by taking possession of *Rajah Deedar Hossain's* property. The Appellant, in consequence of such disputes, instituted a summary suit under Act, No XIX. of 1841, for the protection of the property; and on the 19th of *November*, 1842, the Judge of the Civil Court of *Zillah Purneah* ordered that the Appellant should give security, which he did, and was put into possession of the property.

During the pendency of the summary proceeding, *Bahadoor Hossain*, on the 19th of *December*, 1841, presented a petition in support of the validity of the deed of gift and Will, and he and the three other younger Sons and the five Daughters of *Rajah Deedar Hossain*, received from the Appellant their allowances, in accordance with the terms of their Father's Will.

On the 16th of *Assar*, 1254 *Moolky* (*July*, 1846), *Bahadoor Hossain* executed a money Bond, to secure to *Lukkee Saho* and *Doulut Saho*, Bankers, the sum of Rs. 5,400, with interest, and *Ranee Kheeroonessa* (the Widow of *Rajah Deedar Hossain*) executed to *Lukkee Saho* and *Doulut Saho*, a security Bond, by way of suretyship, for payment by *Bahadoor Hossain* of that sum.

Lukkee Saho and *Doulut Saho*, some time after-

wards instituted a suit against *Bahadoor Hossain* and *Ranee Kheeroonessa* on these Bonds; and on the 18th of *November*, 1847, a decree was made against them for the payment of the sum of Rs. 6,168, principal and interest.

The decree-holders took proceedings in the suit for the purpose of realizing the amount decreed to them by attaching and selling what was alleged to be the right and interest of the surety, *Ranee Kheeroonessa*, in the *Soorjapoor zemindary*, as Widow of *Rajah Deedar Hossain*. The Appellant, however, submitted a petition of objection in the suit, stating that by reason of the deed of gift and Will, the *Ranee* had no interest in the *zemindary* besides her allowance under the Will, and objecting to the attachment and contemplated sale; and an Order was, on the 6th of *January*, 1852, passed by the Principal *Sudder Ameen* of *Zillah Purneah*, to the effect, that inasmuch as no share of the *Ranee* had been found to exist, it could not be properly sold; and it was ordered, that the property which had been attached should be exempted from sale.

Against this last-mentioned Order the decree-holders appealed to the *Sudder Dewanny Adawlut* at *Calcutta*; and on the 21st of *April*, 1852, it was ordered by that Court, that the Order of the Principal *Sudder Ameen* of *Zillah Purneah* be reversed, and a copy of the proceeding, with a direction, that, according to the request of the Petitioner's decree-holders, the rights and share of the judgment Debtor, whatever that be, in the property attached, be sold by auction.

On the 3rd of *March*, 1853, an auction sale, in execution of the decree of the 18th of *November*, 1847, was held of the right and share of *Bahadoor*

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Hossain, and at such sale one *Motee Lall* became the Purchaser for the price of Rs. 4,025; and subsequently, on the 17th of *June*, 1853, a Bill of Sale of his share in the *Pergunnah Soorjapoor* was made, and on the 5th of *October*, 1858, *Motee Lall*, by deed of that date, in consideration of Rs. 20,000, transferred to the Respondent what he had purchased at the auction sale of the 3rd of *March*, 1853, with mesne profits.

On the 18th of *February*, 1859, more than twelve years after the date of the Bond given by *Bahadoor Hossain* to *Luckhee Saho* and *Doulut Saho*, the Respondent instituted the present suit against the Appellant and other Defendants (the heirs of *Rajah Deedar Hossain*), for possession of 1 *anna*, 13 *gs.* 1 *c.* 1 *kt.* of the entire *Pergunnah Soorjapoor*, with mesne profits.

The Appellant, by his answer, denied the Respondent's right, and pleaded that the suit was barred by limitation; and the other Defendants (co-heirs of *Rajah Deedar Hossain*), by their answers, also denied the Respondent's right to sue them, admitting the validity of the deed of gift and Will.

The Principal *Sudder Ameen* to the *Zillah* Court of *Purneah*, *Abdool Azeel*, gave judgment on the 2nd of *October*, 1860, as follows:—"From the date of the Bond upon which a suit was preferred against *Bahadoor Hossain*, and a decree obtained, after the lapse of twelve years and some months, this suit has been instituted, and there is no doubt that at the time of the execution of the Bond, *Bahadoor Hossain* was of years of understanding and of full age; and from a copy of a petition of *Bahadoor Hossain*, it is evident that *Bahadoor Hossain*, in accordance with the *Was-*

seeutnamah (Will) of his Father, having renounced his right and share in the *zemindary*, has remained satisfied with the allowance; when to the right of judgment Debtor, *Bahadoor Hossain*, in respect to a claim to a share in the *zemindary*, seeing that the entire *zemindary* has been in the continuous possession of *Enayet Hossain*, limitation applies;" and dismissed the suit with costs.

In dissatisfaction with this judgment, the Respondent appealed to the *Sudder Dewanny Adawlut* at *Calcutta*. The appeal came on for hearing on the 13th of *April*, 1863, before Messrs. *Bayley* and *Campbell*, two of the Judges of the High Court of Judicature at *Calcutta*, and on the same day judgment was given, reversing the decree as to the operation of the Regulation of limitations. The judgment concluded as follows:—"It may be very much regretted that under the old system, rights and interests in action, and not in possession, should be absolutely sold; but since they have been sold under the system then existing, we cannot think that, in the present case, the Purchasers are debarred from trying their rights by time. We, therefore, order that the case be remanded to the Court of original jurisdiction, to be tried on its merits."

The facts of the second appeal in no way differed from the first, so far as related to the deed of gift and Will of *Rajah Deedar Hossain*, and the possession under the summary decree. That suit arose under these circumstances:—

Shortly after the summary Order, a deed of release was executed by the five Daughters of *Rajah Deedar Hossain* (including *Ruheem Oonissa*), and by the

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Widow, to the Appellant, which recited the execution by *Rajah Deedar Hossain* of the deed of gift and Will, and the summary proceedings before mentioned, and the Order made thereon, and that liberty to bring regular suits was reserved to the heirs of *Rajah Deedar Hossain*. The release contained the following declaration:—"We, therefore, having of our free will and accord, foregone our claim to a share in the inheritance, have agreed to all the terms of the Will of our ancestor, and engage and give in writing, that we and our heirs, from generation to generation, shall receive the allowances inserted in the Will, as mentioned below, in cash, from the said Trustee (the Appellant) and his heirs." At the foot of the deed was a detailed statement of the allowances referred to in the deed, including the allowance to be paid to *Ruheem Oonissa*, who received such allowance as it became due.

On the 5th of *Kartick*, 1255 *Moolkee*, *Ruheem Oonissa* executed a money Bond to secure to *Luchmee Put* and *Motee Lall*, Bankers, the sum of Rs. 335. 8a.

Afterwards, *Luchmee Put* and *Motee Lall* instituted a suit against *Ruheem Oonissa* on the Bond, and on the 14th of *March*, 1850, a decree was made against her for the payment of the sum of Rs. 426 and costs. On the 4th of *April*, 1853, an auction sale, in execution of this decree, of the right and share of *Ruheem Oonissa* was made; and *Motee Lall*, one of the decree-holders, by his *Gomashtah*, became the Purchaser for the price of Rs. 211. 6a., which was set off against the amount of his decree. Subsequently, on the 17th of *May*, 1853, a Bill of sale was made to *Motee Lall*, of the property or

right sold of *Ruheem Oonissa* in the *Pergunnah Soorjapoor*.

No further proceedings were taken by *Motee Lall* until the 21st of *Assur*, 1265, when he, by deed of that date, in consideration of Rs. 6,500, transferred to the Respondent, *Sumeerchand*, what he had purchased at the auction sale of the 4th of *April*, 1853, with mesne profits.

On the 1st of *March*, 1859, *Sumeerchand* instituted a suit against the Appellant and others, being the majority of the heirs of *Rajah Deedar Hossain*, for possession of the share of *Ruheem Oonissa* in *Pergunnah Soorjapoor* (being 18 g., 2 c., 2 k), with mesne profits.

The Appellant, by his answer, denied the right of the Respondent, *Sumeerchand*, and pleaded that his suit was barred by limitation. The majority of the other Defendants, the co-heirs of *Rajah Deedar Hossain*, also put in their answers, denying the right of the Respondent, *Sumeerchand*, to sue them, and admitting the validity of the deed of gift and Will. *Ruheem Oonissa*, by her answer, also admitted the validity of the deed of gift and Will, and her own acquiescence in the provisions thereof, and the receipt by her of allowances in conformity therewith.

The principal issue recorded by the Judge of the Civil Court of *Zillah Purneah* was, whether limitation has been incurred in the suit of the Plaintiff, or not.

On the 2nd of *October*, 1860, *Abdool Azeel*, the Principal *Sudder Ameen* of the Civil Court of *Purneah*, gave judgment in the suit as follows:—"The suit which the Plaintiff has instituted for the possession

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of the rights and share of the Debtor in the entire *zemindary* for 18 *gs.* 2 *cs.* and 2 *kts.* is fully barred by limitation. Because it is manifest from the proceedings, dated the 19th of *November*, 1842, that after the decease of *Rajah Deedar Hossain*, the Appellant did, according to the purport of the deed of gift and Will executed and delivered by his Father, prefer a suit under Act, No. XIX. of 1841, and by a decision of the Judge, the Appellant obtained possession of the entire *zemindary*, and that possession continues up to this day. Upon inquiry from the Pleaders of the Defendants, it appears that *Ruheem Oonissa* is older than *Rajah Enayet Hossain*, and from the date of the possession of the Appellant, this suit is preferred after twelve years. And when the claim of *Ruheem Oonissa* must, in consequence of limitation, be dismissed, the Plaintiff, who is the representative of *Ruheem Oonissa*, cannot in that event be entitled to possession and mesne proceeds of the share. Therefore, by reason of limitation, the investigation of any other matter is unnecessary. It is accordingly ordered, that the claim of the Plaintiff be dismissed with costs."

On appeal, the High Court of Judicature at *Calcutta*, consisting of Messrs. *Bayley* and *Campbell*, on the 13th of *April*, 1863, gave judgment over-ruling the decree of the lower Court on the question of limitation. The material part of the judgment was in these terms: "It may be very much regretted that under the old system rights and interests in action, and not in possession, should be absolutely sold; but since they have been sold under the system then existing, we cannot think that in the present case the purchasers are debarred from trying their rights

by time. We, therefore, order that the case be remanded to the Court of original jurisdiction, to be tried on its merits."

The appeals were from both these decrees, and as the same point was involved, they were directed to be heard together.

There was no dispute about the facts, the question turning upon the operation of the *Bengal Regulation* III. of 1793, sec. 14, as a bar to the suits.

In both appeals—

Mr. *Field*, Q.C., and Mr. *Pontifex*, appeared for the Appellant, and

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the respective Respondents.

With respect to the first appeal, it was submitted, on the part of the Appellant, that *Bahadoor Hossain*, as one of the heirs of *Rajah Deedar Hossain*, had not in his lifetime disputed the deed and Will, but, on the contrary, had, with a majority of the heirs of *Rajah Deedar Hossain*, accepted the allowance under the Will, and that he took no step to set aside the summary decision in 1842; that *Motee Lall* having had personal dealings with *Bahadoor Hossain*, was acquainted with the fact of his acquiescence in the validity of the deed and Will, and, as it would have been impossible for him to bring a suit against the Appellant with any chance of success, the transfer by him to the Respondent was resorted to. That more than twelve years had elapsed from the date of the Bond before the institution of the suit, without any proceedings being instituted or claim made against *Bahadoor Hossain* or any persons claiming under him

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in respect to *Rajah Deedar Hossain's* estate; and, as to the second appeal, that *Ruheem Oonissa* had also confirmed the provisions of the deed of gift and Will, and accepted her allowance under the Will, and that more than twelve years had elapsed from the date of the judgment in the summary proceedings in which *Ruheem Oonissa* was a party, and from the date of her confirming the deed and Will, before the institution of the suit.

For the Respondents it was contended, that the rule laid down by the Courts in *India*, in giving effect to the Regulations of limitation, was that when fraud is charged, the period of limitation is not reckoned from the time when it is committed, but only from the time when it was discovered; and that the period of twelve years, prescribed by *Ben. Reg. III., 1793, sec. 14*, had not expired when the present suit was brought, inasmuch as the Respondents were, from "good and sufficient cause, precluded from redress," as the Appellant had acquired and held possession of the immovable property of his Father, *Rajah Deedar Hossain*, by "fraud or other unjust or dishonest means," and therefore, under *Ben. Reg. II. of 1805, sec. 3*, the Respondents were entitled to the extended period of sixty years; that the Appellant had not held "quiet and unmolested possession" of the estate during a period of twelve years antecedent to the claim being preferred in a competent Court, so as to bring him within the exception contained in *Ben. Reg. II. of 1805, sec. 3 cl. 3*, or to authorize the Court to apply the twelve years rule of limitation, and lastly, that, being decree-holders at an execution sale, the Regulations did not apply.

Judgment in both appeals was delivered by—

The Right Hon. The Lord Justice SELWYN.

These are appeals from the decision of the High Court, which has reversed the decision of the Court below, and has in substance held, that the Regulations of limitation does not apply to this case.

It appears that the property in question is claimed under a deed of gift, which applies to one-third of it, and under a Will, which applies to the remaining two-thirds. Very shortly after the death of the Testator, which took place in the year 1841, and in consequence of disputes which had arisen in the family with respect to the validity of the deed of gift and the validity of the Will, proceedings were instituted, which resulted in a decree, not of a final character, but which was made in the presence of all the parties on the 19th of *November*, 1842, and under which the eldest Son of the Testator was put in possession of the property, in which, he has remained ever since. It would thus appear to be beyond doubt, that the Regulations, at all events, commenced to run from the 19th of *November*, 1842, and it is, therefore, incumbent upon those who have taken these proceedings, under the plaint filed on the 18th of *February*, 1859, to show some circumstances which would take the case out of the operation of the ordinary rule, much more than twelve years having elapsed between those two dates.

Now, the claim which is filed is not, as has been argued at the Bar, a claim founded upon the notion of the person under whom the Claimant claims being a *cestui qui trust* of the eldest Son, under a deed

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or Will, but a claim under an intestacy distinctly alleging the Mahommedan law, and praying for the division of the estate of an intestate under that Mahommedan law, and a specific claim of the share to which the person under whom the Plaintiff claimed, would have been entitled in the case of an intestacy.

In answer to that, the Regulations of limitation is set up. It appears, that the particular person under whom the Claimant in the first of the appeals now before us derives his title, although he was an infant at the time when the suit of 1841 was instituted, and when the petition, which has been referred to was filed by him in support of the deed of gift and of the Will, became of age in the year 1842, and before the date of the decree, and he must be taken to have had full cognizance of all the facts and matters which were in dispute at and after that time. Although a second suit was instituted by other members of the family in the year 1852, it does not appear that in the subsequent proceedings any new questions have been raised, or that any new facts have been elicited, or that any new discovery of any fraud has been made; and their Lordships are of opinion, that there has not been in this case any such discovery of fraud as can be held to have postponed the operation of the Regulations of limitation.

There is another point which appears to have been taken by the learned Judges of the High Court, and which seems to have been founded on the supposition that there was some distinction to be made in favour of a person claiming under an execution sale, as contradistinguished from the representatives of any

person claiming under an ordinary assignment or conveyance.

In the opinion of their Lordships, there is no foundation, in principle or authority, for any such distinction; but the person who comes here as the Plaintiff, and who is the Respondent in the first appeal, must stand in the same position as *Bahadoor* would have stood, if he had been the Claimant, and as the Daughter would have stood in respect to the other share, if she had been the Claimant. With respect to both of them, the Daughter was of age at the time of the proceedings in 1842; the Son, *Bahadoor Hossain*, became of age in 1842; and they have had full notice of all the facts. Their Lordships have already said, that there has been no subsequent discovery of any fraud, nor indeed, as far as appears, any new matter whatever brought in issue between these parties, beyond that which was raised in the proceedings in 1841 and 1842. The learned Counsel who argued the case on the part of the Respondents has been unable to produce any authority in support of any such distinction as has been supposed to exist between a person standing in the position of a Claimant under an execution sale, and a Claimant under any other conveyance or assignment.

It appears, therefore, to their Lordships that in this case the time must be taken to have begun to run, at all events from the date of the decree, on the 19th of *November*, 1842, and that there is nothing whatever to bring this case within any of the exceptions to the Regulations of limitation; and consequently, that the decisions of the *Zillah* Court were right, and that the High Court ought to have dismissed the appeal from that decision with costs.

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It is admitted, that the second appeal now before their Lordships, raises precisely the same questions as the first.

The Order, therefore, which their Lordships will humbly recommend Her Majesty to make, will be to reverse the decisions of the High Court, and to declare that that Court ought to have dismissed the appeals before them with costs. We think that the costs of both these appeals should follow the event.

RADHA JEEBUN MOOSTUFFY ... *Appellant* ;

AND

TARAMONEE DOSSEE ... *Respondent.**

On appeal from the High Court of Judicature at Calcutta.

23rd Feb.,
1869.

Under the terms of a *Soluhnamah* compromising a suit brought to obtain possession of a share in a family ancestral estate, it was provided (*inter alia*), that S., the elder Brother, should,

THERE were two appeal, in this case from decrees of the High Court at *Calcutta*.

The Appellant and *Surbessur* were Brothers, and the question involved in the first of these appeals, was the right of the Respondent, as representing her deceased Husband, *Surbessur*, to sue out execution under a decree made by the Court sanctioning a

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor :—The Right Hon. Sir Lawrence Peel.

in consideration of the rents of a specified part of the family estate, estimated to cover the expenses, perform the *Deb Sheba* (worship of the family Idols) and other religious ceremonies for the family. This com-

Soluhnamah, compromising a suit, respecting the ancestral estate, and allotting the rents of part of the family estate to *Surbessur* for the performance by him of the *Deb Sheba* (worship of Idols) of the family. *Surbessur* claimed possession and mesne profits of such estate in consequence of the Appellant keeping him out of possession of the share so assigned to him for the religious observances. The Appellant contended, that *Surbessur* had not performed the trusts in performing the worship of the Idols for him.

The second appeal was brought against a decree of the High Court made in a suit by the Appellant against *Surbessur* for damages by reason of the non-performance by him of the *Deb Sheba* for the Appellant. In this decree the Court refused the Appellant leave to cross-examine the Defendant, whom the Appellant had called as a witness to support his case, and dismissed his suit as the Court considered he had no right of action.

These appeals arose under the following circumstances:—

promise was sanctioned by the Court, and a decree made thereon. On a motion by *S.* to enforce the decree on an allegation that *R.*, his Brother, had not performed his part of the compromise by putting him in possession, the Court decreed execution of the decree, and awarded mesne profits; *R.* also obtained a further Order for execution on the ground that *S.* had not performed the trust, and that he had been compelled to perform the religious ceremonies at his own expense. This the Court refused to enforce, as the omission was caused by his default in not putting *S.* in possession of the lands. Held, that proof of the non-performance of the religious ceremonies by *S.* was not a condition precedent to the enforcement by *S.* of the decree.

In a suit brought by *R.* against *S.* to recover moneys alleged to have been expended by *R.* in the performance of the *Deb Sheba*, in consequence of *B.* neglecting to perform the trust as to the family worship, the Plaintiff's witnesses having failed to prove any damages, he called the Defendant as a witness, who gave evidence to the effect, that the Plaintiff had no claim; and the Court refused to allow the Plaintiff to cross-examine him. Held, that although the refusal to cross-examine was not justifiable, yet, from the other evidence in the suit, it was clear, that the Plaintiff had sustained no damage or had, in the circumstances, a right of action.

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TARAMONFE
DOSSEE.

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On the 12th of *March*, 1850, the Appellant instituted a suit in the Court of the Principal *Sudder Ameen* of *Zillah Nuddea* against his elder Brother and Guardian, *Surbessur*, and against *Lucky Doss Mitter Moostuffy*, the Son and heir of another Brother, *Cassissur Mitter Moostuffy*, and thereby sought to obtain possession of his share of the ancestral property, and the mesne profits during the period of his minority. At that time there were other suits pending between the same parties, and ultimately a compromise was entered into and a *Soluhnamah* executed on the 24th of *August*, 1853, of the matters in litigation. The fourth article of which provided, that *Surbessur* should perform at his own expense the *Deb Sheba* (worship of the Idols), and other religious ceremonies for the three, the costs of which was fixed at Rs. 2,900 a year, and that, in consideration of his so doing, he should hold possession for his life of a specified part of the joint property estimated to produce that amount. This compromise received the sanction of the Court on the 24th of *August*, 1853, and it was ordered, that both parties should carry out the terms of the compromise.

It appeared that, in respect to the family worship, this part of the compromise was not carried out, and, in 1860, *Radha Jeebun* obtained an Order for the execution of the decree of the 24th of *August*, 1853, against *Surbessur*, for failure in complying with the terms of the compromise in other respects. *Surbessur* alleged, that he had never received possession of the property set apart by the deed of compromise to answer the expenses of the *Deb Sheba*, and claiming a right to set-off the mesne profits of this property against *Radha Jeebun's* judg-

ment, and prayed that the execution of the decree might be stayed. On the 13th of *July*, 1860, the Principal *Sudder Ameen* considered these objections, and ordered that the execution sought for by *Radha Jeebun* should be carried out, and declared that *Surbessur* was at liberty to take out execution for the recovery of any amount that might be due to him under the decree. Accordingly, on the 20th of *July*, 1860, *Surbessur* filed a petition in the Court of the Principal *Sudder Ameen* of *Nuddea*, praying for possession of the property, and that the mesne profits from the date of the compromise might be set off against *Radha Jeebun's* judgment. By another petition, filed on the 18th of *August* following, *Surbessur* alleged the amount to which he was entitled to be Rs. 9,463, per annum, with interest. As this amount exceeded the amount due to *Radha Jeebun* under his judgment, *Surbessur*, on the 27th of *August* following, prayed that the balance might be realized by attachment and sale of *Radha Jeebun's* property.

Notice of this application, and requiring him to bring forward his objections, was served on *Radha Jeebun*, who filed his petition of objection, and alleged that *Surbessur* had not performed the Objector's share of the family religious rites and ceremonies, in consequence of which, the Objector had to defray them at his own expense, and consequently that *Surbessur*, not having performed his part of the compact, was not entitled to call upon the Objector to perform his part. *Surbessur* answered, that he had performed a part of the worship of the deities in accordance with the terms of the compromise, and was prevented from performing the residue by the want of the necessary funds, *Radha Jeebun* having

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kept him out of the lands assigned for that purpose. The Principal *Sudder Ameen* at *Maherpore*, to whose Court the case had been transferred, by a proceeding of the 29th of *November*, 1861, admitted *Surbessur's* claim, and directed that execution should proceed as prayed, on the ground that the Order of the Principal *Sudder Ameen* of the 13th of *July*, 1860, was conclusive as to his right to obtain possession of the lands and the mesne profits claimed.

Radha Jeebun appealed from this Order to the High Court at *Calcutta*, but on the 30th of *August*, 1862, that Court, consisting of Mr. Justices *Steer* and *Morgan*, dismissed the appeal, on the grounds, first, that as the decree confirming the terms of the compromise had not been complied with, the Court had power to put the decree in force; second, that the alleged breach of trust could not be inquired into in this proceeding, but that the Appellant could prefer his claim in a regular suit; and, third, that as *Surbessur* had not been put in possession of the lands, he was entitled to mesne profits.

Nothing further took place until the 19th of *May*, 1864, when *Taramonee Dossee*, the Widow of *Surbessur*, who had died in the interval, filed a petition, asking for a revivor of the execution case, and to recover the mesne profits and interest from the date of the compromise, amounting to Rs. 16,575.2.6. *Radha Jeebun* filed objections to this petition, and *Taramonee Dossee* put in her answer, in which she alleged, that the Order of the Principal *Sudder Ameen* of *Maherpore* of the 29th *November*, 1861, and the Order of the High Court on appeal therefrom, dated the 30th of *August*, 1862, were conclusive.

On the 8th of *April*, 1865, the case came on before *Baboo Juggobundhoo Bundopadhya*, the Principal *Sudder Ameen* of *Zillah Nuddea*, who decided that the Orders relied on by *Taramonee Dossee* were final, and overruled *Radha Jeebun's* objections, with costs.

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Radha Jeebun appealed against this Order on the following grounds:—First, that *Surbessur*, the late Husband of the Applicant for execution, having been a mere Trustee for the entire family, with respect to family worship and other charities, and the properties, *wasilat* of which was claimed, having been agreed to be left in his hands only in the character of a Trustee, and she not being the representative of her late Husband as regarded the matter of the trust, was not entitled to claim *wasilat* with respect to the property. Second, that the main question which was before the High Court on the former occasion was, whether her late Husband was entitled to take out execution at all, therefore, any opinion pronounced with respect to the other points could not be considered as conclusive between the parties. Third, that there being no provision in the *ruffanamah* for *wasilat*, as admitted by the High Court in its judgment of the 30th of *August*, 1862, the mere declaration by it on that occasion, that *wasilat* was realizable in the shape of damages made, as the same was in the execution department, whose legitimate province was to interpret the decree as it stood, could not have the legal effect of supplementing the decree itself. Fourth, that there being no provision for interest or *wasilat* in the decree, and the High Court having pronounced no opinion on that point on the former occasion, the Lower Court is wrong in awarding the

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same, under an erroneous impression that all the points in dispute between the parties have been settled by the High Court's judgment of the 30th of *August*, 1862; and, lastly, that there being cross decrees between the parties, the same ought to have been allowed to be set off, under the provisions of section 209 of the Code of Procedure.

On the 27th of *July*, 1865, the appeal was heard by the High Court. The judgment of the Court, consisting of Messrs. *Loch* and *Glover*, after stating the facts of the case, proceeded as follows:—
 "The Principal *Sudder Ameen* has allowed the Widow of *Surbessur* to take out execution against the judgment Debtor, on the ground that, as representative of her Husband, she is entitled to his property. This Order would, under ordinary circumstances, be correct, but in the present case the Principal *Sudder Ameen* appears to us to have altogether ignored the special point at issue. He assumes, that the objections regarding the alleged breach of trust on the part of *Surbessur* were disposed of by the High Court in the latter's favour; but this is not the case, this Court simply decided the general principle, that a person dispossessed unjustly was entitled to recover not only possession, but mesne profits likewise; it did not take into consideration the special grounds of the Widow's present claim. It declined to go into the question, and referred the parties to a regular suit. The point, therefore, as to whether *Surbessur* did or did not expend the endowment money in the services of the Idols is still undisposed of. In the present case, it is manifest, that the judgment Creditor, in order to take out execution against her late Husband's Brother (one only of the

two appears to have resisted the Widow's demand, the other having paid his *quota*), must show, that during the time of his alleged dispossession, he kept up the religious services out of his own funds. On no other supposition can the Widow have any claim. *Surbessur* had no right to the endowment moneys personally, he was a mere Trustee bound to expend all that he received in the service of the Idols, and if for any reason the whole, or any part, of those moneys remained unexpended, the surplus would not belong to *Surbessur's* estate, but to the endowment. Now, we can find no proof whatever on the record, that the services of the Idols were kept up by *Surbessur* out of his own resources, it is a mere plea advanced by the judgment Creditor, but unsupported by any evidence whatever. The circumstances of the case have been so altered since the High Court's decree, that we find it impossible to give the judgment Creditor the benefit of it. That decree proceeded entirely on *Surbessur's* right to recover possession of the lands. At the time it was passed, *Surbessur* had that right, but his Widow is not in the same position. The right was personal to the Husband, as Trustee of the endowment, and did not descend to his heirs. The Widow can neither execute the decree for possession nor for *wasilat*, as the usufruct of the land would be the property of the endowment. As it stands, the decree, so far as she is concerned, is absolutely unfructuous. Under these circumstances, we have no alternative but to decree this appeal with costs on the Respondent, and reverse the Order of the Principal *Sudder Ameen*. It is still open to the Widow to show, in a regular suit, that during the time of her Husband's dispossession, he, notwithstanding-

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ing the failure of the trust fund, paid the expenses of the Idol services at his own costs. If she can prove this, she will be entitled to whatever sums *Surbessur* so paid, and can recover them from the judgment Debtor."

Taramonee Dossee presented a petition for a review of this judgment, and, with the view of proving the payment of the cost of the worship by *Surbessur* out of his own funds, filed a judgment of the High Court delivered on the 2nd of *February*, 1864, and which judgment is the subject of the second appeal hereinafter mentioned.

This petition was admitted, and on the 10th of *January*, 1866, the High Court, consisting of Messrs. *G. Loch* and *F. S. Glover*, after observing that they were not satisfied that the new evidence tendered ought not to have been within the Petitioner's knowledge at the time the case was heard in appeal, nevertheless decided to admit the evidence, and held, that that judgment was decisive on the question of payment of the cost of the family worship by *Surbessur*, and amended their previous judgment by affirming the Order of the Principal *Sudder Ameen* of the 8th of *April*, 1865.

From this decision the first appeal was brought.


The suit out of which the second appeal arose, was instituted by *Radha Jeebun* in the Court of the Principal *Sudder Ameen* of *Zillah Hooghly*, the plaint disclosed the same facts, and the Plaintiff sought to recover Rs. 966. 10. 8 per annum, being one-third of Rs. 2,900, as stipulated in the deed of compromise, as the cost of the *Deb Sheba*, and other ceremonies, which he had been compelled to perform at his own expense, contrary to the terms of the com-

promise. This sum, for the nine years during which he contended *Surbessur* had left *Radha Jeebun's* part of the ceremonies unperformed, amounted, with interest, to Rs. 12,388. 10. 9.

Surbessur, in his answer, submitted, first, that as *Radha Jeebun's* objections had been disallowed by the Principal *Sudder Ameen* of *Maherpore* on the 29th of *November*, 1861, he was no longer entitled to insist upon his present claim; and, secondly, that there was no mention in the compromise rendering him liable to pay the expenses of any ceremonies performed by *Radha Jeebun*, under the existing circumstances. *Surbessur* also alleged, that jointly with his co-sharer, *Lucky Doss Moostuffy*, he had regularly performed certain family religious ceremonies which he specified.

The Court fixed the following issue:—"According to the terms of the *Soluhnamah* (deed of compromise), can the Plaintiff get the amount claimed or not?"

The Defendant called three of his servants as witnesses, who deposed, that after the deed of compromise, *Surbessur* solely performed the whole of the religious ceremonies specified therein for one month, and that subsequently *Surbessur* and *Lucky Doss Moostuffy* had jointly performed their share of the ceremonies, and that *Radha Jeebun* had performed his share separately at his own expense. The Appellant examined one witness, whose evidence failed to establish his case. The other witnesses summoned for the Plaintiff did not appear, and he filed a petition praying that the case might be decided by summoning the Defendant in person and taking his deposition. The Defendant was accordingly summoned, and was asked by the Court the following question:—"The Plaintiff has made a claim to get

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money for the performance of rites and ceremonies relating to his share of the *Deb Sheba*, together with interest, whether the same is justly due by you or not?" The Defendant answered:—"In my opinion the Plaintiff's claim is not due by me. I am not liable for the claim."

The Plaintiff then submitted that he had not intended to abide by the answer of the Defendant, and asked leave to cross-examine him. The Principal *Sudder Ameen, Nazirooddeen*, refused to put any further questions to the Defendant, or to allow any to be put on behalf of the Plaintiff, and, on the ground, that there was no proof of the Plaintiff's claim, and that his claim had not been proved from the deposition of the Defendant, dismissed the suit with costs.

From this decision the Appellant appealed to the High Court of Judicature at *Calcutta*, and *Surbessur*, having died before the hearing, *Taramonee Dossee*, his Widow, was made Respondent in his stead.

The appeal came on for hearing on the 2nd of *February*, 1864, when the Judges, Mr. *Morgan* and *Sumbhoonath Pundit*, although disapproving, as the judgment stated, of "that portion of the case which has resulted in the Defendant coming into Court and giving a statement without any cross-examination or without any other question being asked him by the Court," and admitting, that in some respects the investigation was not full and satisfactory, nevertheless dismissed the appeal and affirmed the decision of the Lower Court with costs, on the ground, that the remaining evidence, in the absence of the Plaintiff's witnesses, and of the evidence of the Defendant on which he relied for his proof, failed, in their opinion, to support the case. And the Court further declared, that it seemed to them doubtful,

under the terms of the Order, whether even if the Plaintiff had shown an expenditure by him on account of the family worship he could, under the circumstances, have brought a suit against the Defendant to recover the money so expended.

Against this decision the second appeal was brought.

As the Respondent did not appear in either appeal, the same were heard together *ex parte*.

Mr. *Cave* for the Appellant, in both appeals.

In the first appeal, he contended, that the original judgment of the High Court was right, as although the Order of the 30th of *August*, 1862, was final, the Respondent, *Taramonee Dossee*, was not entitled to the execution sought for, except on proof that her Husband, *Surbessur*, had performed the religious rites for him at his own expense, and that no evidence of that fact was given ; and,

In the second appeal he submitted, that there had been a miscarriage of justice, as the Appellant was entitled to cross-examine the Defendant, and to put to him all such questions as were material to the issue raised between the parties, although the Plaintiff's claim was sufficiently proved from the other evidence.

The Right Hon. Sir JAMES W. COLVILE.

Their Lordships are of opinion, that no ground has been laid for prolonging this unfortunate litigation by the allowance of these appeals.

It is unnecessary to state the earlier proceedings in the first suit. It seems sufficient to begin with the Order of the 30th of *August*, 1862, which Mr. *Cave* has admitted to be final. By that Order it was held, that *Surbessur* has established his right to

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take out execution for the mesne profits claimed by him, as well as for the possession of the land included in the fourth article of the compromise; and that it was no bar to his execution that it had been alleged that he had broken trust, inasmuch as he had not carried out the terms in accordance with which it was agreed that he should hold possession.

This Order was neither the subject of appeal, nor, in their Lordships' opinion, could have been successfully made so. There is no ground, as it appears to them, for saying, that the proof of the performance of the religious ceremonies was a condition precedent to the enforcement of the claim for the rents which the fourth article of the compromise gave to *Surbessur*. And without inquiring, whether many of the points which are now taken might not have been raised in the litigation which led to the Order in question, or are concluded by it, it is sufficient to state, that its effect was, that as between the two Brothers, *Surbessur* was entitled to take out the execution which he claimed to take out, and that the Respondent, if he had any claim by reason of the non-performance of the religious ceremonies, or any other breach of the agreement, was bound to prefer that claim in a regular suit.

In anticipation of that Order, the younger Brother (the Appellant) had commenced the suit out of which the other appeal has arisen. It will be convenient to consider the nature of that suit, and the right of the party to have the decree that has been made in it reversed or altered, before we proceed to the subsequent proceedings in the original suit.

The suit which was so instituted was not exactly such a suit as that suggested by the judgment of the 30th of August, 1862. What the Judges of the

High Court said was, that if the Appellant, on the ground of any breach of agreement, claimed a right to dispossess the Respondent's Husband, *Surbessur*, he might prefer that claim in a regular suit. But the suit really instituted was of this nature. It was a suit in which the party alleged, that by reason of the non-performance by *Surbessur* of the duty which he had undertaken under the fourth article of the compromise, he, the Plaintiff, had been compelled to perform certain religious ceremonies at his own cost, and that he had a right of action over against *Surbessur* for the moneys expended in the performance of those ceremonies. It was, therefore, essential, in such a suit, that he should show that he really had that right of action; that there not only had been the breach of duty alleged, but that by reason of it he was entitled to recover the damages which he had sustained from his Brother. And he had, of course, to prove the amount of those damages.

Now, as to the proof of the damages, that failed altogether. He produced only one witness, who proved nothing; he called the Defendant, who denied generally that the claim was well founded. Upon that the Judge of first instance made a decree against him, and dismissed the suit.

The case was carried, by appeal, before the High Court, and they affirmed the decision. They remarked on the miscarriage of the Judge in refusing to allow the Plaintiff to cross-examine the Defendant when called, and their Lordships fully concur in the propriety of that censure. Nevertheless, if the Defendant had been cross-examined, all he could have proved would have been so much of the Plaintiff's case as rested on the performance of the religious ceremonies, and by possibility, though that was not

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very probable, the cost to which the Plaintiff had been put in the performance of them; but that, in their Lordships' opinion, would not have made out that he had any right of action. For the existence of that right of action you must go back to the original compromise, and, in their Lordships' opinion, the Plaintiff had wholly failed to prove that he had such a right of action, because, upon the compromise and the acts of the parties, the case stood thus:—The compromise gave certain lands, and the rents of those lands, to the elder Brother, coupled, we may admit, with the performance of a trust, but a trust of that nature which is constantly vested in the managing or elder Brother of a Hindoo family, a trust which implies some considerable beneficial interest. If the non-performance of that trust, or the non-performance of those ceremonies, could, by any possibility, give such right of action to the Appellant as that asserted in his suit, it surely was necessary for him to show that it was not by reason of any default on his part that the non-performance of the trust took place.

Now, the undisputed facts of the case are, that the younger Brother did not perform his part of the agreement, that he retained his share of the rents of the land; and that the elder Brother was put to take out execution under the decree founded on the compromise, in order to get the funds which that compromise gave to him.

Therefore, it seems to their Lordships, that this suit, brought by the Appellant, substantially failed upon the ground which is suggested by the Judges in their judgment of the 2nd of *February*, 1864, viz. that there was no cause of action at all, and in these circumstances it would be unreasonable to send down

that case for a new trial, because the Judge did not allow the cross-examination of a witness, whom, moreover, by reason of his subsequent death, it is now impossible to examine.

These observations, therefore, dispose of the second appeal, and I now revert to the proceedings in the original suit. *Surbessur* died pending the second suit, and without having taken out execution under the decree of the 30th of *August*, 1862. His Widow then applied to take out execution, and as she merely sought to take out execution for that which had been adjudged to belong to her Husband, and was, therefore, part of his estate, there seems no ground whatever for disputing her right, or imposing upon her the obligation of proving something which *Surbessur* had not been called upon to prove.

The Principal *Sudder Ameen* seems, therefore, in their Lordships' opinion, to have taken a right view of the question. He overruled the objections to the execution, which had been urged by the Appellant.

The case then went by appeal to the High Court, and two of the learned Judges of that Court then took the view which I have just alluded to as being, in their Lordships' opinion, erroneous, saying that she could not stand in her Husband's shoes: that it lay upon her to prove, that *Surbessur* had actually expended his own moneys in performance of the ceremonies, and they, therefore, in the first instance, overruled the Order and judgment of the Principal *Sudder Ameen*. There was, then, an application for review before the same learned Judges; and upon their being referred to the decree in the other suit, and to some additional evidence, but principally to the decree in the other suit, they came to the con-

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clusion, that the Widow must be taken to have established, chiefly, if not wholly, by that decree, that of which they had required proof from her, viz. that *Surbessur* had expended his own moneys in the performance of the ceremonies, that, therefore, their former Order was wrong, and that the final Order to be made was, that she should be entitled to issue execution,—in fact, to affirm the Principal *Sudder Ameen's* Order. A subsequent Order was made, declaring her entitled to interest on the amount for which the original execution had been sued out.

Their Lordships are unable to assent to the reasoning of the learned Judges of the High Court. They think, for the reasons which I have given, that the original Order, reversing the Principal *Sudder Ameen's* Order, was wrong; but if that Order had been properly made, they would have been unable to adopt the reasoning of the learned Judges, as to the effect of the decree in the suit of the Appellant, which certainly does not prove that *Surbessur* expended his own moneys in the performance of ceremonies. The utmost which that decree can be taken to prove is, that the Appellant had failed to show that he had performed separate ceremonies upon his own account, or that he was entitled to recover the sum claimed in that suit in respect of those ceremonies.

The effect, however, of the final Orders of the High Court is to give to the Widow that to which their Lordships consider she is entitled; and, therefore, the Order which they will humbly recommend Her Majesty to make is, that both these appeals be dismissed, and that the Orders of the Courts below, which are the subjects of them, be affirmed.

CASES

IN
THE PRIVY COUNCIL
ON APPEAL FROM
THE EAST INDIES.

FIRST APPEAL.

THE COLLECTOR OF MADURA ... *Appellant*,
AND
MOOTTOO RAMALINGA SATHUPATHY ... *Respondent*.

SECOND APPEAL.

ANANDAI, *alias* RANEE KUNJARA NACHEAR and MANGALASWARA NACHEAR ... } *Appellants*,
AND
RANEE PARVATA VARDANI NACHEAR, }
MOOTTOO RAMALINGA TAVER, and } *Respondents*.
THE COLLECTOR OF MADURA ... }

THIRD APPEAL.

RANEE PARVATA VARDANI NACHEAR ... *Appellant*,
AND
ANANDAI, *alias* RANEE KUNJARA NACHEAR and MANGALASWARA NACHEAR ... } *Respondents*.*

On appeal from the High Court of Judicature at Madras.

THESE appeals were brought from a decree of the High Court, made in two suits, the one brought by

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Westbury, the Right Hon. Lord Romilly (Master of the Rolls), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor :—The Right Hon. Sir Lawrence Peel.

26th, 27th,
28th, & 29th
Feb. 1868.

According
to the law pre-
valent in the
Drávada
Country, in
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the Appellants in the second of the above appeals, the Widow and Daughter of *Moottoo Vijaya Raganadha Sathupathy*, a former *Zemindar* of *Ramnad*, to establish their reversionary right to the *zemindary* of *Ramnad* against the first Respondent in the same appeal, then in possession of the *zemindary*; to obtain an annual allowance of Rs. 24,000 for maintenance, and to have declared null an adoption made by that Respondent as unauthorized, and in prejudice of their reversionary rights. In which suit the adopted Son, and the Collector of *Madura*, were by order of the Provincial Court made parties. The other suit was brought by the Respondent in the first of the above appeals, as the adopted Son of *Ranee Parvata Vardani Nachear*, the first Respondent in the second appeal, and the Collector of *Madura*, to establish

Presidency, a Hindoo Widow, not having her Husband's authority, may, if authorized by the consent of his kinsmen, adopt a Son to him.

What constitutes consent of the kinsmen must depend on the circumstances of the family. In a joint family, where by the Hindoo law of the District the Widow has only a right to maintenance, if she adopts a Son without her Husband's authority, it is necessary, if her Husband's Father is alive, to obtain his permission, or if he is dead, the consent of all her Husband's surviving Brothers; but where the Widow takes by inheritance the separate estate of her Husband, then the consent of her Husband's nearest kinsmen is sufficient.

Exposition of the effect of the doctrines of Hindoo Law contained in the Treatises, the *Mitācsharā* received in Southern India, the *Mayucha* and *Koustubha* in the *Mahratta* Country, and the *Daya-Bhāga* in Bengal, as laid down by Commentators and received as the governing law in India, regarding a Widow's right to adopt a Son to her Husband without his express authority.

The ruling in the case of *Veerapermall Pillay v. Narrain Pillay* (1 Strange's Mad. Cases, p. 121), that it is indispensable, that the Widow should have the authority of her Husband to adopt, examined and questioned.

The duty of a Judge administering Hindoo Law, is not so much to inquire, whether the doctrine disputed is fairly deducible from the earliest authorities, as to ascertain whether it is one that has been received by the particular School of Hindoo Law, which prevails in the District in which the case arises with which he has to deal, and whether such doctrine has been sanctioned by usage; as by the Hindoo system of law clear proof of usage will outweigh the written opinion of text writers.

The *quantum* of maintenance to be allowed a Widow is peculiarly

affirmatively the adoption made by her, and to have declared illegal a declaration of the Collector, that on her death the property would escheat to the Government.

In the former of these suits the Civil Judge made a decree declaring that the reversionary right there claimed was not in the Plaintiffs, and ordered that the *Zemindar* in possession should pay maintenance at the rate of Rs. 300 per month to the Widow, the first Plaintiff, and Rs. 100 per month to her Daughter, the second Plaintiff; and in the latter suit the Civil Judge decreed for the Respondent in the first appeal (the adopted Son), on the ground, that the *Zemindar*, his adopted Mother, had a right to alienate during her life, and that the Collector had no right to escheat the property of a person whom he admitted to have heirs.

The Collector of *Madura*, a Defendant in both suits, and *Ranee Kunjara Nacheer* and her Daughter, the Plaintiffs in the first suit, both appealed to the High Court against the above decrees of the Civil Judge. These appeals were heard together by the High Court, and on the 17th of *November*, 1864, that Court passed decrees dismissing the two appeals, subject to a modification, by granting a sum of Rs. 10,000 to *Ranee Kunjara Nacheer*, the first Plaintiff in the first of the suits above mentioned, for her maintenance. The appeals to Her Majesty in Council were from these decrees, and were brought by various parties in the suits, against

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within the province of the Court below, and there must be strong grounds to justify any interference of the appellate Court with the exercise of such discretion.

In the Court below, sworn translations of Sanscrit works, little known, embodying Hindoo Law, as to the custom in the different Schools in respect to the Law of adoption, were admitted and acted on by the Courts in *India*. On special application, the Judicial Committee ordered such translations to be sent by the Registrar of the High Court in *India*, and to form part of the record, to be used on the hearing of the appeal.

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the decrees of the High Court. The Appellant in the first appeal being the Collector of *Madura*, and *Ranee Parvata Nachear*, the adopted Mother, the Appellant in the third appeal and Respondent in the second. The question raised and contested was the validity of the adoption of the Respondent in the first appeal by the Widow of the last *Zemindar*, without his authority, or, as it was alleged, the consent of his kindred and relations.

The circumstances which gave rise to these suits were as follows :—

Prior to the year 1795, *Moottoo Ramalinga Sathupathy* was the owner of the *zemindary* of *Ramnad*, in the Presidency of *Madras*. In that year he rebelled against the Government, who, in consequence, declared his *zemindary* forfeited. At the time of such forfeiture he had a Daughter, *Sevagamy Nachear*, and a Sister, *Ranee Mangalswara Nachear*, whose Husband, *Ramasamy Tever*, was then alive. The Government by their proceedings, dated the 3rd of *July*, 1795, determined the succession to the *zemindary* in favour of *Ranee Mangalswara Nachear*.

Ramasamy Tever, her Husband, died in the year 1797, but on the 14th of *May*, in that year, before his death, he and his Wife, *Ranee Mangalswara Nahcear*, executed an instrument of agreement to the effect, that upon some future occasion, if they had no child born to them, they should adopt a Son.

On the 22nd of *April*, 1803, Lord *Clive*, by virtue of his authority as Governor of *Fort St. George*, by a *Sunnud-i-milkeut Istimrar*, or deed of permanent tenure, conferred certain rights, and imposed certain duties, on *Ranee Mangalswara Nachear*. Among such rights was the following

power to transfer "without the previous consent of Government, or of any other authority to whom-ever you may think proper, either by sale, gift, or otherwise, your proprietary right in the whole or in any part of your *zemindary*. Such transfers of your land shall be valid and recognized by the Courts and Officers of Government, provided they shall not be repugnant in the Mahomedan and Hindoo laws, or to the Regulations of the British Government." The *Sunnud*, after providing for the enjoyment and management of the *zemindary* by *Ranee Mangalswara Nacheer*, concluded in the following terms:—"Continuing to perform the above stipulations, and to perform the duties of allegiance to the British Government, its laws and Regulations, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named, the *zemindary* of *Ramnad*."

Subsequently to the grant by such *Sunnud*, the *Ranee*, in 1803, adopted a Son, *Moottoo Vijaya Raghanada Sathupathy*, alias *Annasamy*, hereafter called *Annasamy*, and by a Will dated the 11th of *April*, 1807, the *Ranee* made provisions, under the powers vested in her by the *Sunnud*, entitling him to inherit her estates.

In 1804, one *Chinnasamy*, a Nephew of *Ramasamy Taver*, instituted a suit against *Ranee Mangalswara Nacheer*, claiming that the privileges of *Annasamy* should be conferred on him, *Chinnasamy*, by reason of his having been brought up from infancy by the *Ranee's* Husband, *Ramasamy Taver*, which suit appeared to have been eventually dismissed.

In 1807, *Ranee Mangalswara Nacheer* died, and was succeeded by *Annasamy*.

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Subsequently to the *Ranee's* death, and in or prior to the year 1812, disputes arose about the succession to the *Ranee's* estate, and an investigation with respect to *Annasamy's* adoption took place before the Collector. In the year 1813, *Sevagamy Nachear*, the Daughter of the rebel *Zemindar*, who had forfeited his estate in 1795, instituted a suit against *Annasamy* in the Provincial Court for the Southern Division claiming the *zemindary* of *Ramnad*; and that Court, by its decree, dated the 13th of *December*, 1813, adjudged the *zemindary* to *Sevagamy Nachear*. Against such decree *Annasamy* appealed, and the *Sudder Dewanny Adawlut* at *Madras*, by its decree, dated the 10th of *October*, 1816, reversed the decree of the Provincial Court, and adjudged that the late *Ranee* was legally competent to adopt *Annasamy*; that she did adopt him; and that by such adoption she destroyed the presumptive right of inheritance which would appear to have been possessed by *Sevagamy Nachear* at the time when the succession to the *zemindary* was determined by the Government in favour of her Aunt, the late *Ranee*, in 1795. This decree was, in the year 1828, affirmed by His Majesty in Council. *Annasamy* died in possession of the *zemindary*, in the month of *February*, 1820, during the pendency of *Sevagamy Nachear's* appeal to the Privy Council, and the *zemindary* was thereupon placed under attachment pending such appeal. He had seven Wives, one of whom was *Mootoo Veroyee Nachear*, but had no issue. On the 26th of *January*, 1820, he adopted as his Son, *Ramasamy* (who was the Brother of *Mootoo Veroyee Nachear*),

and, by his Will of the same date, confirmed such adoption.

After the decision of the above appeal, the Southern Provincial Court, acting under the Order of the *Sudder* Court, issued a precept to the *Zillah* Court of *Madura*, on the 10th of *April*, 1829, directing the *zemindary* to be placed in possession of *Ramasamy*, which was accordingly done. It appeared, that previously to that date, but after the decision of the appeal in favour of *Annasamy*, and after his death, *Sevagamy Nacheer* contested, in the *Sudder* Court of *Madras*, the validity of *Ramasamy's* adoption, and that Court directed the Provincial Court to determine the point. This was done, and the result was, that the validity of the adoption was confirmed.

Ramasamy married *Ranee Parvata Nacheer* (the first Respondent in the second appeal), and had issue by her two Daughters only, viz., *Mangalswara Nacheer* and *Dorarajah Nacheer*. *Ramasamy* died in the year 1830, having on the 19th of *April* in that year addressed an *arzi*, or petition, to the Collector of *Madura*, stating his illness, and that he had made an arrangement that his "Mother, *Ranee Mootoo Veroyee Nacheer*, who is my Guardian in every respect, and who holds chief right to this *zemindary*, should enjoy this *zemindary*, maintain my royal Wife, my Daughter, *Mangalswara Nacheer*, of five years old, and a younger Sister—a small child; and when these children shall attain their proper age, to make an arrangement with regard to their right to the *zemindary*, and continue the same, that my natural Brother, *Mootoo Chella Taver*, should manage the affairs of the said *zemindary* until my children shall attain their proper age."

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On the death of *Ramasamy*, in 1830, his adoptive Mother, *Ranee Mootoo Veroyee*, took possession of the *zemindary*, which she held until the 6th of *July*, 1840.

Ramasamy's elder Daughter, *Mongalswara Nachear*, died in the early part of 1840, having previously been married, leaving a Husband, but no issue.

It appeared that, in consequence of a report from the Collector, *Ranee Mootoo Veroyee* was, on the 7th of *July*, 1840, removed by the Government from the guardianship of *Ramasamy's* infant younger Daughter, and from the possession of the *zemindary*, and *Ramasamy's* Widow, *Ranee Parvata Nachear*, was appointed Guardian to the infant.

Some litigation appeared to have taken place between *Ranee Mootoo Veroyee* and *Ranee Parvata Nachear* after the removal of the former from the guardianship of *Dorarajah Nachear*, *Ramasamy's* infant Daughter.

On the 24th of *September*, 1845, *Ranee Parvata Nachear's* younger Daughter, *Dorarajah Nachear*, died. Before her death she and her Husband purported to adopt a Son, *Annasamy*, and by her Will, dated the 23rd of *September*, 1845, she directed that after the death of her Mother, the *zemindary* should be held by her Husband, and subsequently by such adopted Son; and she gave notice of such adoption to the Collector on the 24th of *September*, 1845. It was subsequently alleged that, as the *zemindary* was then under the management of the Court of Wards, and the approval of such Court had not been obtained thereto, such adoption was invalid.

On the 31st of *August*, 1846, *Ranee Parvata Nachear* presented a petition to the Board of Revenue, stating

her intention to adopt a Son, in pursuance of the authority given to her by her Husband, *Ramasamy*, and further stating, that *Ranee Mootoo Veroyee* had purported to have adopted her Sister's son, objecting to such adoption, and praying the Board to declare such last-mentioned adoption invalid. The Board refused to interfere in the matter referred to by such petition.

On the 26th of *February*, 1847, *Ranee Mootoo Veroyee*, *Ranee Parvata Nacheer*, and the two Widows of *Annasamy*, who were also parties to the litigation above mentioned, entered into a *Razenamah*, whereby it was agreed that the allowances to the Widows should be increased, and portions of the *zemindary* estate were to be settled on *Ranee Mootoo Veroyee* and her alleged adopted Son, absolutely. The first clause in the agreement stated, that *Ranee Parvata Nacheer* should enjoy the *zemindary*, and might "adopt a Son at her pleasure, as specified in the supplemental rejoinder."

On the 19th of *May*, 1847, *Ranee Parvata Nacheer* wrote to the Collector, stating that, according to the Hindoo law, and at the consent of her Brother and relatives, she had determined to adopt her younger Sister's Son, on the 24th instant, as her Son and heir to her estate after her. The Collector, on the 21st of *May*, 1847, returned an answer, that *Ranee Parvata Nacheer* must satisfy him of her right to make the adoption according to Hindoo law. *Ranee Parvata Nacheer*, by a petition, dated the 23rd of *May*, 1847, stated that, inasmuch as all the preparation for the adoption had been made, it could not be postponed. In such petition she alleged, that she had the authority of her Husband and of her own relatives to the adoption, and that *Ranee Mootoo Veroyee*, by her execution of the *Razenamah* of the

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26th of *February*, 1847, was estopped from disputing her right to make an adoption.

On the 24th of *May*, 1847, *Ranee Parvata Nachear*, by petition, informed the Collector, that "with reference to the *Razenamah*, submitted by my Mother-in-law, the permission previously obtained from my Husband, and the consent of my relatives, Brothers, and others," she had that day adopted *Moottoo Ramalinga Sathupathy*, the Respondent in the first appeal, as a Son.

On the, 21st of *May*, 1847, *Ramasamy Taver*, the Husband of *Ramasamy's* elder Daughter, *Ranee Mangalswara Nachear*, presented a petition to the Collector, claiming to be entitled to the *zemindary*, and praying that the adoption by *Ranee Parvata Nachear* might be prevented. *Moottoo Chella Taver*, the natural Brother of *Ramasamy*, claiming to be his undivided nearest Cousin in his adoptive family, presented a petition to the Collector, also claiming to be entitled to the *zemindary*, and praying that the adoption by *Ranee Parvata Nachear* might be prevented.

On the 10th of *March*, 1849, the Board of Revenue issued an Order, that after *Ranee Parvata Nachear's* death the *zemindary* should be considered escheated by reason of the adoption being invalid, and some correspondence thereon took place between *Ranee Parvata Nachear* and the Collector.

On the 19th of *September*, 1853, *Sevasamy Taver*, the alleged adopted Son of *Ranee Moottoo Veroyee*, instituted a suit against *Ranee Parvata Nachear*, claiming the immediate right to the *zemindary*, as undivided coparcener and heir of *Ramasamy Taver*, the Husband of the Government donee, in 1795. On the 21st of *December*, 1853, *Ranee Parvata Nachear* put in her

answer to the plaint, alleging that upon the adoption of *Annasamy* into another family, all community of interest with his natural family ceased.

The suit of *Sevasamy* was dismissed by the Civil Judge, with costs. *Sevasamy* appealed to the late *Sudder* Court by petition, dated the 17th of *October*, 1857, in which he stated the grounds of his appeal, and to which he annexed a table of pedigree, purporting to show his relationship to *Ramasamy Taver*. The *Sudder* Court, on the 29th of *March*, 1858, rejected such appeal, as barred by limitation of time.

Against such last-mentioned decree, *Sevasamy* presented an appeal to Her Majesty in Council; but while such appeal was pending, *Sevasamy* and *Ranee Parvata Nacheer* executed a *Razenamah*, dated the 8th of *January*, 1861, whereby it was agreed, that the village of *Idampadel*, a part of the *zemindary*, should thenceforth be the property of *Sevasamy*, that he should be allowed Rs. 700 *per mensem*, from the revenue of the *zemindary*, and that he should be paid from its funds a sum of Rs. 50,000; and that the *zemindary* should be held by *Ranee Parvata Nacheer* and her adopted Son, the Respondent, *Ramalinga*, or by those who might hold any authority from *Ranee Parvata Nacheer*, or by her heirs.

In a communication made by the Collector to *Ranee Parvata Nacheer* on the 28th of *July*, 1855, he stated, "The Government wished me to inform you that they have suspended their former Order to take the *zemindary* in their management after you; moreover, they are unwilling to give any opinion in regard to the validity of the adoption you allege to have made."

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On the 15th of *November*, 1855, the Collector, by a Letter, informed *Ranee Parvata Nachear* that on the 29th of *October*, 1855, the Board of Revenue had cancelled their last-mentioned Order, and had confirmed their former Order of the 10th of *March*, 1849, directing the escheat of the *zemindary* after her death.

On the 9th of *February*, 1858, the first of the two suits in appeal was brought by *Ranee Kunjara*, as Widow of *Annasamy*, and *Mangalswara*, her Daughter, in the Civil Court of *Madura*, against *Ranee Parvata Nachear*, to establish the future right of *Ranee Kunjara* to the *zemindary*, as next heiress, on the death of the Defendant, and for an annual maintenance. *Ranee Parvata Nachear*, by her answer, insisted that the Plaintiff, *Ranee Kunjara*, was only a Concubine and not the Wife of *Annasamy*.

The second suit was brought on the 15th of *February*, 1860, by *Moottoo Ramalinga Sathupathy*, the Respondent to the first appeal, against *Ranee Parvata Nachear* and the Appellant, the Collector of *Madura*, claiming to be put into possession of the *zemindary*, and praying that the Collector's Letter of the 15th of *November*, 1855, might be cancelled.

Ranee Parvata Nachear, on the 26th of *June*, 1860, in her answer admitted the adoption by her of the Respondent, *Moottoo Ramalinga Sathupathy*, and expressed her willingness to give over the *zemindary* to him.

On the 25th of *July*, 1860, the Collector of *Madura* filed his answer, pleading, *inter alia*, that a Widow could not adopt without the authority of her Husband, or, failing that, of all his relatives ; and that the

adoption in question was invalid on both those grounds.

On the 22nd of *February*, 1861, the Judge of the Civil Court called upon the Appellant, the Collector of *Madura*, to prove the illegality of the adoption ; but the Court, on the 6th of *March* in that year, on the ground that there being *prima facie* evidence that there were collateral heirs in existence, which debarred the right of the Government to interfere in the matter, refused to admit the documents produced by the Collector of *Madura* for that purpose, and declared that the examination of the witnesses tendered by the Appellant was unnecessary.

On the 12th of *April*, 1861, Mr. *R. R. Cotton*, the Judge of the Civil Court, decreed, in *Ranee Kunjara's* suit, that she had no right to succeed to the *zemindary* after the death of *Ranee Parvata Nacheer*, she being only her stepmother and excluded from inheriting ; but the Court directed the *Zemindar* of *Ramnad*, for the time being, to pay her and her Daughter Rs. 400 *per mensem* for maintenance. *Ranee Kunjara* and her Daughter appealed from this decree to the High Court at *Madras*.

On the 18th of *March*, 1861, the same Judge of the Civil Court, in the suit by the Collector of *Madura* (the second suit in these appeals), decreed that the Order of the Collector, dated the 15th of *November*, 1855, should be cancelled ; and held that *Ranee Parvata Nacheer* could, of her own authority, assign and transfer the *zemindary* to whomsoever she might think proper, and prohibited the Collector of *Madura* from summarily seizing the estate as an escheat to the Government, while it appeared that there were heirs.

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Against this decree the Appellant, the Collector of *Madura*, appealed to the late *Sudder Dewanny Adawlut*, and on the 26th of *March*, 1863, the Judges of the High Court at *Madras*, which had been in the meantime substituted for the *Sudder* Court, by a proceeding of that date, directed the Civil Judge to decide the following issue: Was the adoption made with the authority of *Ranee Mootoo Veroyee Nacheer*, Widow of *Annasamy*, or with that of any others of the kindred of the late *Zemindar, Ramasamy*, in whose behalf the adoption was made?

Evidence was taken upon this issue, and on the 4th of *September*, 1863, the Judge of the Civil Court (Mr. *R. R. Cotton*) pronounced his judgment on the issue framed by the High Court, to the effect, that the consent of all the then surviving kindred of *Ramasamy* had been obtained to the adoption; that the adoption was made with the authority of *Mootoo Veroyee Nacheer*, and of many of the kindred of *Ramasamy*, but that all the kindred of *Ramasamy* were not at the time consenting parties thereto; that it was clear, that *Sevasamy Taver*, a relation of *Ramasamy's*, and adopted Son of *Ranee Mootoo Veroyee Nacheer*, was not a consenting party, nor apparently consulted, when the adoption was made, as his consent was immaterial.

The two appeals were heard together, and twice argued. In the interval between the two arguments a number of original authorities relating to the law of adoption were collected by Mr. *Norton*, Her Majesty's Advocate-General for *Madras*, the Counsel for the Respondent, *Ramalinga*, and such of them as required translation were handed in, a special Translator being sworn by the Court to trans-

late such authorities, which were made part of the record of the Court, and printed, and copies handed over to the different parties to the appeal. This compilation was entitled "Authorities bearing on the subject of the power of a Hindoo Widow in the *Drávada* Country to adopt a Son in the absence of authority given to her by her Husband during his lifetime." The authorities were arranged under four heads. First, original Sanscrit works embodying the Hindoo Law; second, authoritative declarations of Law made by Pundits or Hindoo Law Officers; third, the publications of European Writers; fourth, decisions of the established judicial Tribunals. This Book, called the "Green Book," was, by an Order in Council dated the 16th of *November*, 1866, directed to be transmitted by the Registrar of the High Court at *Madras* to *England*, and to form part of the record for reference at the hearing of the appeals.

The works comprised under the first two heads, though extensively used and referred to, as well in the arguments in the Court below as before the Judicial Committee, were not considered by either Tribunal of such a satisfactory character as to enable the High Court or the Judicial Committee to act upon them, and the suits below, and on appeal were decided entirely upon the recognized Indian and European authorities, most of which were included in the third and fourth heads of the above collection.

On the 17th of *November*, 1864, the High Court, in the suits comprising the first and second appeals, confirmed the decree of the Civil Court of the 18th of *March*, 1861, and dismissed the appeal of the Collector. On the same day the Court, in the case of the third appeal, confirmed the decree of the Civil

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Court of the 12th of *April*, 1861, subject to the modification, that in lieu of the sum of Rs. 400 *per mensem*, the *Zemindar* of *Ramnad*, for the time being, should pay to the Appellant, *Ranee Kunjara Nachear*, Rs. 10,000 *per annum* from the date of the institution of the suit to that date, and further to pay the Appellant, *Ranee Kunjara Nachear*, Rs. 833. 5a. 4p. monthly, as maintenance.

In support of the decrees an elaborate judgment was pronounced by the High Court, consisting of the Justices *Frere* and *Holloway*, which was, in substance, as follows :—

The Court first considered, whether a Widow without the authority of her Husband could make an adoption; and stated that on the first argument the affirmative had been assumed, on the authority of the note of Mr. *Colebrooke*, to the *Mitácshará*, and that it had been assumed, that Mr. *Colebrooke* in his note meant to include all the followers of the *Mitácshará*, and consequently the whole of the inhabitants of Southern *India*. and the Court had felt it impossible to overrule the opinion of a Jurist so eminent as Mr. *Colebrooke*; but that, when the note was examined, it really only applied to Schools other than those of Southern *India*, and this point of law was then re-argued. Secondly, that, as to the decided cases, the case of *Veerapermal Pillay v. Narrain Pillay* (1 Strange's Mad. Rep. p. 91) was commented on, and two *dicta* of Sir *Thomas Strange* contrasted—one, "that the consent of the Husband was indispensable to adoption into his family;" and the other, that, "according to the doctrine of the *Benares* and *Maharashtra* schools, prevailing in the Peninsula, it (that is, the consent of the Husband) may be sup-

plied by that of his kindred, her natural Guardians." The Court also referred to the preface of *Colebrooke*, p. iv., and *W. H. Macnaghten*, Vol. I. pref. xxi., as to the existence of five different Schools of law, of which the *Benares* School and the *Mahratta* were two; and observed, that it was quite clear, that Sir *Thomas Strange* thought, and stated that adoption by a Widow, with the assent of her Husband's male relations, would be valid, and that such was the rule in Southern *India*. That in the *Bombay* Presidency it was clear, that the Widow might, without the consent of the Husband, adopt a child. The Court then referred to the case No. 161 of 1856 (*Madras Sudder* Decisions for 1858, pp. 5,6), where the *Sudder* Court held, that the authorization of the Husband was supplied by that of his Nephew and nearest male relation. Two other cases of inferior Courts were also referred to, one in 1850, before the Civil Court of *Trichinopoly*, and the other, in 1863, before the Court of the Principal *Sudder Ameen* of *Madura*, which declared the assent of a male relation sufficient to authorize the adoption of a Son to the deceased Husband. Three French cases of the appellate Court at *Pondicherry* were also referred to, in one of which, dated the 15th of *June*, 1844, that Court declared, that it was the recognized doctrine, that in certain parts of *India* the consent of the Husband "*peut-être remplacée par consentement des parents de sa famille, et qu'il paraît certain qu'il est d'usage immémorial à Pondichéry de se contenter de cette dernière autorisation.*" The case of *Raja Haimun Chull Sing v. Koomer Gunsheam Sing* (2 Knapp's P. C. Cases, 203) was relied on as an express decision, showing that there are places governed by the *Benares* school of law in which no assent but that of the

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Husband is sufficient to validate a Widow's adoption. The Court then, after commenting on the above cases, came to the conclusion, that there was not such a weight of judicial authority as could exonerate them from scrutinizing the original authorities upon the subject, which the Court proceeded to do in an elaborate manner. The Court considered the *Dattaca Mimamsa* of *Nanda Pandita* as an authority, that the Widow could neither give nor receive a Son, and referred to the fiction of law which renders the adoption a sort of symbolical begetting, and that the giving and receiving lay under the same prohibition. The Court then referred to the *Smriti Chandrica* and the *Dattaca Chandrica*, works of *Devanda Bhatta*, and his opinion, that a Son might be given by a Mother, if the gift be authorized by an independent male, and that the assent of the Husband stood upon precisely the same footing in the cases of giving and of receiving. The works of *Vidya Narainsamy* were next referred to, as having great weight in the *Madras* school of law, and particularly a work called *Madhavyam*, a commentary upon *Parasara Smriti* of great authority in Southern India; and the Court referred to the analogy derived from the power to the Widow to have a Son actually begotten to her Husband, observing that as the woman in former ages might after her Husband's death procure a natural Son, so with permission she might also procure a given Son, citing the passage. "In the same way the adoption of a Son by a Widow, with the permission of the Father, &c., cannot be censurable in the *Kali* age," and that the "et-cetera" in these passages must not be neglected. That *Sri Rama Pandita*, an authority very generally cited in Southern

India, showed historically, that the Widow was permitted when childless, and her Husband dead, or absent on a pilgrimage, to procure the begetting of a Son upon herself and on behalf of her Husband ; that this original permission had in the present age been repealed ; but that as there was a paramount necessity for a Son, she might, in circumstances formerly authorizing her to procure the begetting of a Son, adopt one ; and the result of his opinion unquestionably was, that she was not only authorized, but morally bound, to adopt. The Court declined to attach any weight to *Pundits'* opinions, and held, that there are material differences between the several subordinate Schools, and that those differences had been always recognized, remarking, that it had been forcibly said, that there was positive judicial authority affirming the Widow's right to adopt without the consent of her deceased Husband, and that for more than forty years that had been the understanding of the profession, and that it would be very mischievous to disturb what had so long been supposed settled. The Court then referred to *Menu*, ch. IX. secs. 64 to 68, and to the practice which had prevailed before his time, for women of the twice-born classes to have children raised by a Brother or other near relation commissioned for the purpose, and to the *Mitácshará*, ch. I. s. xi. pl. 5, in which the Wife's Son is defined as the "child begotten by another person, namely by a kinsman (*Sapinda*) or by a Brother of the Husband," and was prepared to expect, as in other systems of law, that a doctrine, although in itself obsolete, had fructified, and produced visible consequences upon existent law. That as the Brother of the Husband, or *Sapinda*, was the person entitled so

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to procreate, looking at the analogies derivable from the ancient law, to admit the assent of a *Sapinda* to the adoption by a Widow was a perfectly logical inference. The Court was of opinion, that in confirmation of an express decision, it had had the authority of *Devanda Bhatta*, of *Vidya Naramasawy*, and of *Sri Krishna*, though opposed to that of *Nanda Pandita*, who, however, in denying the power of the Widow to adopt at all, was opposed to the Writers of all Schools, and whose reasoning showed, that he considered the giving and receiving to rest upon the same footing, and held that the weight of mere authority was clearly in favour of the capacity of the Widow to adopt. The Court considered, that the question of the Sonship to the deceased could in no way depend upon the title or absence of title of others to the reversion, as presumptive heirs were always disinherited by adoption. And the Court referred to the necessity of the permission of an independent male, on account of the woman's dependency, citing the *Smriti Chandrica*, sec. I. 31, 32, which speaks of the need of an independent male, and does not seem to care who the male is; and also Mr. *Ellis's* remark, that the genius of Hindoo law allows substitution in almost every conceivable case. As to Authors of other Schools, although the Court denied to them the title of authorities in *Madras*, yet it thought it important to see how these Authors had developed and applied the rule, and referred to the Author of *Datta Kaustubha*, and his reasons that, as the act of adoption is one plainly enjoined and obligatory, no dissent of kinsmen could prevent the Widow from doing it, and that their assent was not needed. As to the consent of all the relatives being necessary, the Court held, so far as the weight of authority went, there was no

foundation for the doctrine that the assent of all the *Sapindas* is necessary, and that, founded as the doctrine clearly was upon the old principle of actual begetting by a Brother, or a *Sapinda*, it would be strange if it were so. The Court further held, that the assent of any one of the *Sapindas* would suffice, and at all events the will of the majority of individual members must be taken as the will of the whole body. As to the nature of the assent given in this case, the Court held it clearly established, that not only some of the *Sapindas*, but a majority of them had given their assent. The Court did not dissent from the Civil Judge in finding that *Ranee Moottoo Veroyee* had assented, but considered that a woman herself dependent could not supply the want of independence upon the part of the Wife. Upon the pedigree, the Court thought that the evidence for the Plaintiff as to pedigree was entitled to more weight than that for the defence; and that a witness, named *Ram Rajah*, was present at the adoption, and assented to it. That as to *Sevasamy Taver*, it was clear that he gave a subsequent assent, if such assent would avail, and referred to the maxim of law adopted in *India*, that the absence of positive dissent should be taken as assent. The High Court finally held, that the Widow intended to adopt to herself and her deceased Husband, and consequently the conclusions of the Court were, first, that the Widow of the late *Zemindar* had made a valid adoption. Second, that she made it with the consent of the majority of her Husband's *Sapindas*. Third, that all the *Sapindas* then living had been proved to have assented. Fourth, on the question of maintenance to the Widow, the Court thought Rs. 10,000 *per annum* not excessive; and dismissed the appeals,

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subject to the modification, as to maintenance, before stated, but without costs (*a*).

There were three appeals from the decrees founded on this judgment. The appeals were consolidated and heard together.

Mr. *Forsyth*, Q.C., and Mr. *Pontifex*, appeared for the Collector of *Madura*.

Mr. *Mellish*, Q.C., and Mr. *F. C. J. Millar*, for *Ranee Kunjara* and *Mangalaswara*, the Appellants in the second appeal, and Respondents in the third appeal.

Sir *R. Palmer*, Q.C., Mr. *Coleridge*, Q.C., Mr. *Mundell*, Q.C., and Mr. *Mackeson*, Q.C., for the Respondent, *Ramalinga*, in the first two appeals.

In support of the first appeal it was contended, on behalf of the Collector, that by the evidence it was established, that at the date of the alleged adoption there was not any person, who could be capable of inheriting the *zemindary* upon the decease of *Ranee Parvata Nachear*, and that it must, therefore, fall by escheat to the Government, on the happening of that event. That according to the Hindoo law applicable to the District where the *zemindary* is situate, a Widow was incapable of adopting a Son unless expressly authorized by her Husband; and that it was proved, that *Ranee Parvata Nachear* had not any such authority from her Husband, *Ramasamy*, and could not, therefore, adopt the Respondent, *Ramalinga*. That the alleged adoption was originally intended to

(*a*) The judgment was a full and elaborate disquisition on the law prevailing in Southern *India*, with respect to adoption. It will be found reported in 2 Mad. High Court Cases, 206.

take effect, and was made so as not to interfere with the life interest of *Ranee Parvata Nacheer* in the *zemindary*, and that such adoption, even if she had the power to adopt, was insufficient to create any right in the Respondent, *Ramalinga*, to inherit the *zemindary* at her death. That *Ranee Parvata Nacheer* had no power to alienate or affect the *zemindary* beyond her own life estate; and that the conclusions of the Court below taken on the facts were not warranted by the evidence in the suits.

The Appellants in the second appeal, *Anandai* and *Mangalaswara*, the Mother and Daughter of the deceased *Zemindar*, *Ramasamy*, submitted, that the authority or permission of the deceased Husband was indispensable to a valid adoption being made by any Widow on his behalf, and that in the absence of any such authority or permission, the adoption as alleged by *Ranee Parvata Nacheer*, of the Respondent, *Ramalinga*, was invalid and of no effect; that even if, in the absence of authority or permission from her deceased Husband, the consent or authority of his relatives was sufficient to render valid such adoption, all the relatives must concur in such consent, either at the time or previously to the adoption being made, which had not been done in this case; and that the whole proceeding by *Ranee Parvata Nacheer*, called an adoption, was not in fact, nor was it intended to be, a *bonâ fide* adoption of *Ramalinga*, but was a device and contrivance by *Ranee Parvata Nacheer*, to transfer the *zemindary* and property in perpetuity to herself and her nominee; that if any adoption was really effected, such adoption was simply an adoption to *Ranee Parvata Nacheer* herself, which could have no influence or effect in the devolution

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of the property of her deceased Husband. That these Appellants, as the next heirs in succession, were entitled to succeed to the *zemindary* and property upon the death of *Ranee Parvata Nachear*, and to have their rights with reference thereto declared.

For the Respondent, *Ramalinga*, it was urged, that the adoption by *Ranee Parvata Nachear* of him as Son to her late Husband, and heir to the *zemindary*, *Ramasamy*, was valid; that even if the rule, as contended for by the Appellants, had in the earliest stage of Hindoo Law been, that no adoption by a Widow was valid, yet in later times an adoption by a Widow was considered valid, if made by the authority of the Husband, as was the law now received in *Bengal*; that in the *Drávada* Country, south of the Peninsula, where *Ramnad* is situate, the adoption by a Widow, if made with the sanction of the relatives of the Husband, was valid, according to the law prevailing in Southern *India*. That the adoption of a Son by a Widow was derived from analogy to the obsolete doctrine of a Son procreated to a Widow by a *Sapinda* as heir; that the Sanscrit authorities in force in the *Drávada* Country for the last five hundred years were uniformly in favour of such adoptions; that the *Futwas* of the *Pundits* of the *Zillah* and *Sudder* Courts throughout the *Drávada* Country were also in favour of such adoptions; that the decided cases in the *Madras* Courts had upheld such adoptions, the Text and other European Writers agreeing in stating such to be the law and practice in Southern *India*, which for forty years had been the received opinion of the profession at *Madras*.

As to the power of a Widow by the Hindoo Law and custom current in the *Drávada* Country to

adopt a Son to her deceased Husband without his authority, either express or implied, given to her in his lifetime, though with the consent of his kindred, and the authorities received in Southern *India*, the Respondents cited *Morley's Dig.* Vol. I. pp. clxxxix. cciii. *Colebrooke* on Inheritance, Intro. p. iv.; *Datta Madharinga*, or the *Dattaka Mimansa* of *Madhavacharya*; *Datta-Mimansa* of *Nanda Pandita*; Note by Mr. *Ellis* in *Strange's "Hindu Law,"* Vol. II. p. 162 [2nd Ed.]; *W. H. Macnaghten's "Hindu Law,"* Vol. I. Pref. xxii.; *Elberling* on Inheritance, ch. III. secs. 32, 3, 4, p. 16. They also referred to the decrees transmitted with the record, of the French appellate Court at *Pondicherry*, respectively dated the 15th of *March*, 1826; the 15th of *June*, 1844; the 2nd of *December*, 1848. A decree of the Court at *Trichinopoly*, dated 21st of *June*, 1850; of the Court at *Pondicherry*, dated the 7th of *December*, 1850. A decree of the Court at *Pondicherry*, dated the 4th of *November*, 1856, and of the Court at *Tanjore*, dated the 19th of *March*, 1864, allowing a Widow to adopt a Son without the authority of her Husband.

On the general law of adoption the following native authorities and Text writers were cited and relied on by both sides:—The *Parasara Madhaviya*; the *Vyarahara Madhavya* by *Madhavacharya*, referred to in *Strange's Manual of Hindoo Law*, pars. 72, 73, 353; *Mahabharata*, ch. 103; the *Viramitrodāya*, referred to in *Sutherland* on Adoption, Synopsis, note vi. p. 235; *Vyuvuharu Muyookhu*, [Trans. by *Borradaile*,] ch. IV. sec. V. pl. 17; *Vyarahara Koustoobha*, referred to in *Morley's Dig.*, Vol. I. Intro. p. ccvii.; *Strange's "Hindu Law,"* Vol. I. p. 79; *ib.* Vol. II., p. 92, 3, 9, 96,

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115, 168. The *Mitácshará* of *Vijnyaneswara* by *Colebrooke*, ch. I. sec. xi. pl. 9, note; *ib. Stokes' "Hindu Law,"* p. 415; *Subodhini*, a Commentary on the *Mitácshará*, by *Visvesvara Bhatta*, *Colebrooke*, ch. I. sec. xi. pl. 9; *Morley's Dig.*, Vol. I. Intro. p. ccxvii.; *Ward's "View of the History, &c., of the Hindoos,"* Vol. I. p. 447; *Balam Bhatta's* Comm. on the *Mitácshará* of *Vijayaneswara*; *Sutherland* on Adoption, Synopsis, note p. 236; *Colebrooke* on Inheritance, pref. p. ix; *W. H. Macnaghten's "Hindu Law,"* Vol. I. p. 66; *Datta Mimansa*, by *Sri Rama Pandita*; *ib.* sec. I. pl. 15, 18, sec. IV. pl. 10; *Stoke's "Hindu Law,"* pp. 415, 534, 5, 573; *Dattaka-Chandrika* of *Devanda Bhatta*, sec. I. pl. 31, 32 [Trans. by *Sutherland*]; *Dattaka-Mimansa* of *Nanda Pandita*, secs. 15, 16; *ib.*, *Sutherland*, Note x. p. 236; *Vyavahara Durpanum*; *Datta Mohodadhi*; *Datta Grahana Deepika* by *Narayana Choodamony Deetchita*; *Datta Pootra Vidhi*; *Datta Ratnakara*, by *Dharma Rajah Deekshita*; *Datta Chandrica*, by *Pattara Achariya* (a); *Daya-Krama Sangraha*. And, in addition to the above ancient authorities collected and used in the High Court, the following cases and authorities from English and Indian reports were also cited:—*Veerapermall Pillay v. Narrain Pillay* (b); *Raja Haimum Chull Sing v. Koomer Gunsheam Sing* (c); *Janki Dibeh v. Suda Sheo Rai* (d); *Raja Shumshere Mull v. Ranee Dilraj Konwur* (e); *Atchema v. Rungama* (f); *Sreenarain Rai v. Bhya Jha* (g); *Mussumat Bhoobun Moyee Debia v. Ram*

(a) Cited in Sudder Court, Dec., 1854, pp. 42-5.

(b) 1 Strange's Mad. Cases, 91.

(c) 2 Knapp's P. C. Cases, 203.

(d) 1 Sud. Dew. Ad. Rep. 197.

(e) 2 Sud. Dew. Ad. Rep. 169.

(f) 4 Moore's Ind. App. Cases, 1.

(g) 2 Sud. Dew. Ad. Rep. 27.

Kishore Acharj Chowdhry (a); Sree Brijbhookunjee Muharaj v. Sree Gokoolootsaojee (b); Huebut Rao Mankur v. Govind Rao Bulwunt Rao Mankuz (c); Appaniengar v. Alemalvo Ammal (d); Virbudro Hurrybudru v. Baee Ranee (e).

As to the effect to be given to the *Futwas* of the *Pundits*, as authority where they are apparently irreconcilable with the opinions of approved Text Writers on Hindoo law, the cases of *Myna Boyee v. Ootaram (f)* and *The Collector of Masulipatam v. Cavalry Vencata Narrainapah (g)* were referred to.

With respect to discretion of the Court in awarding the *quantum* of maintenance to the Widow, *Exp. Janaky Ummah (h)* was referred to.

Their Lordships reserved judgment, which was now pronounced by

The Right Hon. Sir JAMES W. COLVILE.

The principal question raised by these appeals is the validity of an adoption made by the Widow of the last male *Zemindar* of *Ramnad*.

His title to that *zemindary*, which is of great extent, and, like many of the large *zemindaries* in the south of *India*, in the nature of a *Raj*, or Principality, descendible to a single heir, was thus derived. In 1795, the then *Zemindar*, *Moottoo Ramalinga Sathupathy*, having rebelled against the Government of the East India Company, was deprived of his *zemindary*,

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(a) 10 Moore's Ind. App. Cases, 279.

(b) 1 Borr. Bom. Rep. 193.

(c) 2 Borr. Bom. Rep. 75.

(d) Mad. Sud. Dec. 1858, pp. 5, 6. (e) 2 Morris, Bom. Rep. 1.

(f) 8 Moore's Ind. App. Cases, 400.

(g) 8 Moore's Ind. App. Cases, 529.

(h) 2 Strange's Mad. Cases, 285, 288.

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which in the month of *July* in that year was granted to his Sister, *Ranee Mangalaswara Nachear*. Her title was confirmed by a formal *Sunnud*, executed on the 22nd of *April*, 1803, by Lord *Clive*, the then Governor of *Madras*, which granted the *zemindary* to her, her heirs, successors, and assigns. She was married to *Ramasamy Taver*, who died some time between 1797 and 1804; and in the latter year *Ranee Mangalaswara Natchear*, then a Widow, and professing to act under a written agreement between her and her late Husband, adopted one *Annasamy*, his Nephew, whose title she afterwards confirmed by a Will executed on the 11th of *April*, 1807. She died in that year, and was succeeded by *Annasamy*. He had seven Wives, of whom only his chief Wife, *Mootoo Veroyee Nachear*, and the Appellant, *Ranee Kunjara*, need be mentioned, but had no male issue by any of them. And on the 26th of *January*, 1820, he adopted a Son, *Ramasamy*, who was the natural Brother of *Mootoo Veroyee Nachear*, and, by a testamentary instrument of that date, confirmed that adoption, stating it to have been made "by himself and his chief Wife, *Mootoo Veroyee Nachear* unanimously." He died in *February*, 1820, and was succeeded by *Ramasamy*, who died in 1830, without male issue, but leaving a Widow, the Respondent, *Ranee Parvata Nachear*, and two infant Daughters, *Mangalaswara* and *Doraraja*, surviving him. It is unnecessary to notice the unsuccessful suits by which the titles of *Annasamy* and *Ramasamy* were impeached during their lives, though some of the proceedings in them help to swell the voluminous record before their Lordships. The title of *Ramasamy* to the *zemindary*, as stated above, is the common ground of all the

parties to this litigation, and, on the consideration of these appeals, must be taken to be incontestable.

On the death of *Ramasamy*, without male issue, his successor in the *zemindary*, according to the course of succession *ab intestato*, was his Widow. He had, however, two days before his death, addressed to the Collector, as the representative of Government, the *arzi* of the 19th of *April*, 1830. In that document, after stating that he was suffering from small-pox, and that the issue of his illness was uncertain, he expressed himself as follows: "I have made an arrangement that my Mother, *Ranee Mootoo Veroyee*, who is my Guardian in every respect, and who holds chief right to this *zemindary*, should enjoy this *zemindary* and all other things; pay *peishkist* to the *Cirkar*; maintain my royal Wife, my Daughter, *Mangalaswara*, of five years old, and her younger Sister, a small child; and when these children shall attain their proper age, to make an arrangement with regard to their right to the *zemindary*, and continue the same; that my natural Brother, *Moottoo Chella Taver*, should manage the affairs of the *zemindary* until my children shall attain their proper age; and I have issued necessary orders for the strict observance of the above arrangement."

The affairs of the *zemindary* seem to have been managed under this arrangement between 1830 and 1840. The Respondent, *Ranee Parvata Nacheer*, is said to have been herself very young at the date of her Husband's death; her children were infants; and the Mother-in-law was probably the only member of the family with any capacity for business. In 1840, *Mangalaswara*, the Daughter of *Ramasamy*, who had previously been married, died after giving

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birth to a male child, who did not survive her. About that time differences arose between *Ranee Parvata Nachear* and her Mother-in-law, who appears to have set up some claim to the *zemindary* in her own right. The Board of Revenue, acting as Court of Wards, intervened; appointed, in *April*, 1840, *Ranee Parvata Nachear* Guardian of *Dorarajah*, her infant Daughter, in the place of *Mootoo Veroyee*; and assumed the management of the estate, treating apparently *Dorarajah* as *de facto Zemindar*, either by virtue of the *arzi* executed by *Ramasamy*, or by reason of *Ranee Parvata Nachear's* waiver of her rights in favour of her infant Daughter.

Dorarajah died on the 24th of *September*, 1845. She had previously been married, and having no children, attempted, on the day before her death, to adopt as a Son a child named *Anandai*. By the document, called her Will, she declared, however, that this person would only be entitled to the *zemindary* in succession to her Mother, *Ranee Parvata Nachear*, whom she calls "the chief heiress to the *zemindary*." This adoption was communicated to the Collector by a Letter of the 23rd of *September*, 1845, but was treated by him as invalid under the 25th section of *Mad. Reg. V.* of 1804, because made by a disqualified landholder without the consent of the Court of Wards. The right of *Ranee Parvata Nachear* to the *zemindary*, as heiress either to her Husband or to her Daughter, was, therefore, recognized by the Revenue authorities, who, in *April*, 1840, put her in possession of it as a qualified proprietor, and relinquished the management of it to her.

In the meantime, and ever since 1840, *Mootoo Veroyee* had been engaged in active litigation with

Ranee Parvata Nachear and others for the enforcement of her alleged rights to the *zemindary*. The proceedings in her last suit are set forth in the record. For the most part they have no bearing upon any of the questions which their Lordships have now to determine; and it is unnecessary to notice any of them, except the supplemental rejoinder, which was filed by *Ranee Parvata Nachear* on the 6th of *March*, 1846; and the *Razenamah*, or agreement of compromise, by which this litigation was terminated on the 26th of *February*, 1847. In the former *Ranee Parvata Nachear* asserted, apparently for the first time, a right to adopt a Son to her Husband, either under an alleged authority from him, in the event, which had happened, of both his Daughters dying without issue, or under the more general power of adoption which is disputed on these appeals. By the latter, *Mootoo Veroyee*, in consideration of the provision made for her and her Foster-son, *Sevasamy*, declared that *Ranee Parvata Nachear* might thenceforward enjoy the *zemindary* for ever; and, besides, might adopt a Son at her pleasure, as specified in the supplemental rejoinder.

It is clear, therefore, that whatever obscurity and confusion there may be in the history of the *zemindary* and its management between the death of *Ramasamy* in 1830, and the month of *May*, 1847, *Ranee Parvata Nachear* was at the last-mentioned date in undisputed possession as *Zemindar* of *Ramnad*.

In that state of things she made the adoption which is the subject of the present dispute. On the 19th of *May*, 1847, she gave notice to the Collector of her intention to adopt her Sister's younger Son, and invited him to be present at the ceremony. On

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the 24th of the same month she formally adopted the Respondent, *Ramalinga*. It is admitted that all the requisite ceremonies were duly performed, and that the adoption cannot be impeached, except on the ground of the insufficiency of her power to make one. The Board of Revenue, by an Order, dated the 10th of *March*, 1849, declared that the adoption was invalid, and that on the death of *Ranee Parvata Nachear* the *zemindary* would escheat to Government. On the 23rd of *July*, 1855, the *Madras* Government set aside this Order, and determined to recognize the adoption until it should be declared invalid by a decree of a Civil Court. But on the 29th of *October*, 1855, the same Government cancelled its former Order, and confirmed the Order of the Board of Revenue of the 10th of *March*, 1849; and caused this, its final determination, to be intimated to *Ranee Parvata Nachear* through the Collector, by a Letter dated the 15th of *November*, 1855.

The first of the suits out of which these appeals arise (No. 3 of 1856) was instituted in that year by *Ranee Kunjara*, claiming, as the last surviving Wife of *Annasamy*, and her Daughter, *Mangalaswara*, against *Ranee Parvata Nachear* alone. They impeached the validity of the adoption, insisted that on *Ranee Parvata Nachear's* death *Ranee Kunjara*, as the next in succession, would be entitled to the *zemindary*, and claimed maintenance in the meantime. *Ranee Parvata Nachear*, by her answer, alleged that *Ranee Kunjara* was not the Wife but the Concubine, *Annasamy* and could have no title to the *zemindary*. Various persons afterwards intervened under different titles, and were all, by supplemental plaint, made parties Defendants to this suit. But none of them,

except the Respondent, *Ramalinga*, and the Collector, are parties to these appeals, or have any interest therein.

The second of the two suits (No. 1 of 1860) was brought, in *February* of that year, by the Respondent, *Ramalinga*, who had then attained his majority, against *Ranee Parvata Nachear* and the Collector. Against the latter it sought to have the before-mentioned Order of intimation of the 15th of *November*, 1855, set aside as illegal; and against the former it prayed that immediate possession of the *zemindary* might be adjudged to the Respondent, *Ramalinga*.

The second suit was the first heard, and by his decree, dated the 18th of *March*, 1861, the Civil Judge ordered, that the Order of the Collector of the 15th of *November*, 1855, and his Orders to certain subordinate Officers therein referred to, should be cancelled; and that, as he had failed to establish any right to the estate, or to invalidate the acts of *Ranee Parvata Nachear* in respect to it, he should abstain from all further interference; and that *Ranee Parvata Nachear*, subject to the provisions of Hindoo law, and section 8 of *Mad. Reg. XXV.* of 1802, might, without the previous consent of the Collector, or of any other authority, assign and transfer to the Plaintiff (the Respondent, *Ramalinga*), or whomsoever she might think proper, by sale, gift, or otherwise, her proprietary right in the *Ramnad zemindary*. The decree further declared, that it was to be without prejudice to the Collector's right to bring a regular suit for the estate, if he conceived that the Government had a superior title to the party in possession, but it prohibited him from summarily seizing it as an escheat whilst there were heirs.

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The decree made by the same Judge in the first suit bore date the 12th of *April*, 1861. It found that *Ranee Kunjara Nachear* was one of the Wives of *Annasamy*, but that as such she had no right to succeed to the estate after *Ranee Parvata Nachear*, being only her stepmother, and, therefore, excluded from inheriting; it further decreed, that the *Zemindar* of *Ramnad*, for the time being, should pay to the Plaintiffs (the Appellants, *Ranee Kunjara Nachear* and her Daughter) maintenance at the rate of Rs. 400 *per mensem*, with the arrears of such maintenance from the date of the institution of the suit.

Against the first of these decrees the Collector, and against the second *Ranee Kunjara* and her Daughter, appealed to the High Court of *Madras*; and on the 26th of *March*, 1863, that Court made an Order on both appeals, whereby it directed the Civil Judge to try the following issue: "Was the adoption made with the authority of *Mootoo Veroyee*, Widow of *Annasamy*, or with that of any others of the kindred of the late *Zemindar*, *Ramasamy*, in whose behalf the said adoption was made?" It further gave certain directions as to the evidence to be produced on the trial of the issue.

This issue was accordingly tried on the 1st of *September*, 1863; and the findings of the Civil Judge were in effect, that the consent of *Mootoo Veroyee*, and of all the then surviving kindred of *Ramasamy*, had been obtained to the adoption. Against this finding the Collector, as well as *Ranee Kunjara* and her Daughter, again appealed to the High Court, which Court, on the 17th of *November*, 1864, after two hearings, pronounced an elaborate judgment in favour of *Ranee Parvata Nachear's* right to adopt, and her

exercise of it in the particular case, and in doing so the Court came to the following conclusions:—

First, that the Widow of the late *Zemindar* had made a valid adoption; that there was no doubt that it was made with the assent of the majority of her Husband's *Sapindas*; and that though it might be doubtful, whether the Civil Judge was right, there were not sufficient grounds for saying that he was wrong, in thinking that all the *Sapindas* then living had been proved to have assented.

Second, that, considering the extent of the property and the fact that she was the last surviving Widow of the *Zemindar*, *Annasamy*, *Ranee Kunjara* was entitled to a more liberal maintenance than that awarded by the Civil Judge; and that such maintenance should be at the rate of Rs. 10,000 *per annum*. Subject to that modification, the decrees below were affirmed, and the appeals dismissed without costs.

From the decrees drawn up in conformity with this judgment, the following appeals have been presented, viz.:—

First, an appeal by the Collector, impeaching the validity of the adoption, and also objecting to so much of the decree of the 18th of *March*, 1861, as declared, or implied, that *Ranee Parvata Nacheer* had power to alienate or affect the *zemindary* beyond her life interest.

Secondly, an appeal by *Ranee Kunjara* and her Daughter, also impeaching the adoption; and further objecting to the decree of the 12th of *April*, 1861, in so far as it declared that *Ranee Kunjara* had no right of succession to the *zemindary*.

Thirdly, a cross appeal by *Ranee Parvata Nacheer* and *Ramalinga*, objecting to the maintenance awarded

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by the High Court as exorbitant; and insisting that the decree of the Civil Judge ought not to have been varied in that respect.

All these appeals have been heard together; and their Lordships have now to dispose of them.

The principal contest has been upon the broad and general question, whether by the Hindoo law, as current in what is known as the *Drávada* Country (wherein *Ramnád* is situate), a Widow can adopt a Son to her Husband without his express authority? and if so, by whose assent that defect of authority must be supplied.

Their Lordships think it will be convenient to consider in the first place how this question really stands, upon the authority of Mr. *Colebrooke* and Sir *Thomas Strange*.

Mr. *Colebrooke's* note on the *Mitácshará* (chap. I. sec. XI., art. 9), which has been much discussed, clearly involves three propositions: First, that the Widow's power to receive a Son in adoption, subject to some conditions, is now admitted by all the Schools of Hindoo law except that of *Mithila*. Second, that the *Bengal* (or *Gaura*) School insists, that the Widow must have the formal permission of her Husband in his lifetime. Third, that some at least of the other Schools admit the adoption to be valid, if made by the Widow with the assent of her Husband's kindred. The first two propositions are admitted; but it has been argued for the Appellants, that on the true construction of this note, Mr. *Colebrooke's* authority for the last proposition is limited to the *Mahratta* School, in which the treatise called "*The Muyookhu*" is the predominant authority. *Balam-Bhatta*, however, whom he cites as an authority for a power of adoption

in the Widow wider even than that expressed in the third proposition, was a Commentator of the *Benares* School. And the several notes of Mr. *Colebrooke*, at pp. 92, 96, and 115 of the second volume of *Strange's* "Hindu Law," seems to their Lordships to show conclusively, that he considered the doctrine embodied in the third proposition to be common to the followers of the *Mitácshará* in the *Benares* as well as in the *Mahratta* School, and as such to be receivable as the law current in the *Zillah Vizagapatam*, which lies within the northern, or *Andra* division of the *Drávada* Country.

Again, Sir *Thomas Strange's* statement of the law in his work, Vol. I. p. 79, is clear and unambiguous. He says: "Equally loose is the reason alleged against adoption by a Widow, since the assent of the Husband may be given, to take effect (like a Will) after his death; and, according to the doctrine of the *Benares* and *Maharashtra* Schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural Guardians; but it is otherwise by the law that governs the *Bengal* Provinces."

Their Lordships entertain no doubt, that the term "the Peninsula," as used here, and other passages by the same Author, denotes that part of *India* which is south of the line drawn from *Ganjam* to the Gulf of *Cambay*, and includes the whole of the *Drávada* District. The learned Counsel for the Appellants, however, appeal from Sir *Thomas Strange* as a text writer to Sir *Thomas Strange* as a Judge, and cite his *dictum* in *Veerapermall Pillay v. Narrain Pillay* (1 *Strange's* Mad. Cases, pp. 103 & 121), as opposed to this passage. In that case, Sir *Thomas Strange*, after citing the text of *Vasishta*, says: "Hence it

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may be inferred, what appears confirmed by opinions of living Hindoo Lawyers, and by every case of the kind we are acquainted with, that the consent of the Husband is indispensable to adoption into his family." But this passage does not alter the view which their Lordships have already expressed as to the effect of the matured authority of Sir *Thomas Strange*. The precise question which is now under consideration, was not in issue in that case, where there was a written authority from the Husband, and where the real issue was, whether the Widow could adopt a boy not designated in that written authority. Again, the case was decided in 1801, at a time when the ancient authorities of Hindoo law were far less accessible to an European Judge than they have since become. And Sir *Thomas Strange*, in his work composed twenty years later, says of this very case of *Veerapermall Pillay v. Narrain Pillay*, that it was discussed on comparatively imperfect materials; that the public was not then possessed of the extensive information contained in Mr. *Colebrooke's* translation on the law of inheritance, and the Treatises on adoption since translated by Mr. *Sutherland*, to say nothing of the MSS. materials that came subsequently to his own hands, and which had contributed largely to every chapter of his work. There can, therefore, be no doubt but that the passage in his Book contains the matured opinion of Sir *Thomas Strange*, and that it must be treated as an authoritative declaration of that opinion controlling his *dictum* in *Veerapermall Pillay v. Narrain Pillay*.

Having thus ascertained what was the opinion of two of the highest European authorities upon this question of the Hindoo law current in the South of

India, their Lordships have next to consider, whether any sufficient reason has been assigned for treating that opinion as unfounded.

The remoter sources of the Hindoo Law are common to all the different Schools. The process by which those Schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent Commentaries. The Commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of *India*; Schools with conflicting doctrines arose. Thus the *Mitácshará*, which is universally accepted by all the Schools, except that of *Bengal*, as of the highest authority, and which in *Bengal* is received also as of high authority, yielding only to the *Daya Bhága* in those points where they differ, was a commentary on the Institutes of *Yajñawalkya*; and the *Daya Bhága*, which, wherever it differs from the *Mitácshará*, prevails in *Bengal*, and is the foundation of the principal divergences between that and the other Schools, equally admits and relies on the authority of *Yajñawalkya*. In like manner there are glosses and commentaries upon the *Mitácshará* which are received by some of the Schools that acknowledge the supreme authority of that Treatise, but are not received by all. This very point of the Widow's right to adopt is an instance of the process in question. All the Schools accept as authoritative the text of *Vasishta*, which says, "Nor let a woman give or accept a Son unless with the assent of her Lord." But the *Mithila* School apparently takes this to mean that the assent of the Husband must be given at the time of the adoption, and, therefore, that a Widow

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cannot receive a Son in adoption, according to the *Dattaca* form, at all. The *Bengal* School interprets the text as requiring an express permission given by the Husband in his lifetime, but capable of taking effect after his death; whilst the *Muyookhu* and *Koustubha*, Treatises which govern the *Mahratta* School, explain the text away by saying, that it applies only to an adoption made in the Husband's lifetime, and is not to be taken to restrict the Widow's power to do that which the general law prescribes as beneficial to her Husband's soul. Thus upon a careful review of all these Writers, it appears, that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the Husband, than to the authority to adopt being independent of the Husband.

The duty, therefore, of an European Judge who is under the obligation to administer Hindoo Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindoo system of law, clear proof of usage will outweigh the written text of the law. The Respondent, *Ramalinga*, insists that, tried by either test, the proposition for which he contends, will be found to be correct.

The industry and research of the Counsel in the Courts below have brought together a *catena* of texts, of which many have been taken from Works little known, and of doubtful authority. Their Lordships concur with the Judges of the High Court in declining to allow any weight to these. But the highest

European authorities, Mr. *Colebrooke*, Sir *Thomas Strange*, and Sir *William Macnaghten*, all concur in treating as works of unquestionable authority in the South of *India* the *Mitácshará*, the *Smriti Chandrika*, and the *Madhavyam*, the two latter being, as it were, the peculiar Treatises of the Southern or *Drávada* School. Again, of the *Dattaca Mimansa* of *Nanda Pandita*, and the *Dattaca Chandrika* of *Davanda Bhatta*, two Treatises on the particular subject of adoption, Sir *William Macnaghten* says, that they are respected all over *India*; but that when they differ the doctrine of the latter is adhered to in *Bengal* and by the Southern Jurists, while the former is held to be the infallible guide in the Provinces of *Mithila* and *Benares*. The *Dattaca Mimansa*, by the Author of the *Madhavyam*, is also recognized as of high authority in the South of *India* by Mr. *Ellis* in his note at page 168 of the second volume of *Strange's* "Hindu Law."

Of these Treatises, the *Mitácshará* is silent on the point in question. The *Dattaca Mimansa* of *Nanda Pandita* (sec. 1, Articles 15 to 18, and Articles 27 and 28) is opposed to the Respondent's view of it; but it seems equally opposed to an adoption by a Widow, under any circumstances. The *Dattaca Chandrika* (sec. 1, Articles 31 and 32) allows a Widow to give a Son in adoption where her Husband has not forbidden her to do so, implying his assent from the absence of prohibition. The *Smriti Chandrika* also permits a Mother to give her Son, if she be authorized to do so by an independent male. And it is argued, that what these last two authorities lay down concerning a Widow's right to give, must, by parity of reasoning, be taken to be laid down concerning her

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right to receive a Son in adoption. The *Madhavyam* (if that term is confined to the *Parasara Madhaviya*, and does not embrace all the works of *Vidya Narainsamy*) seems also to contain no direct determination of the point in question; but the *Dattaca Mimansa* of that Author clearly and explicitly declares the right of the Widow to adopt with the authority of her Father-in-law, and whatever other kinsmen of her Husband may be comprehended under the *et cætera*. It cannot, therefore, be said, that the proposition laid down by Mr. *Colebrooke*, and adopted by Sir *Thomas Strange*, is not supported by at least one of the original Treatises of undoubted authority in *Drávada*. The *Dattaca Mimansa* of *Sri Rama Pandita*, who is stated by the Judges of the High Court to be an authority very generally cited in the South of *India*, also confirms the proposition.

Their Lordships have excluded from their consideration of what is the positive law of the *Drávada* Country the peculiarly Mahratta Treatises (the *Muyookhu* and *Koustubha*), and also the *Viromitrodáya*, which is a Treatise of especial authority at *Benares*. It must, however, be admitted, that the fact of the reception of the doctrine in question by Schools so closely allied to that of *Drávada* is in favour of the hypothesis that it also obtains in the latter, and strengthens the authorities which directly support that hypothesis.

The evidence that the doctrine for which the Respondents contend has been sanctioned by usage in the South of *India* consists partly of the opinions of *Pundits*, partly of decided cases. Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court. These opinions, at one time enjoined to be followed,

and long directed to be taken by the Courts, were official, and could not be shaken without weakening the foundation of much that is now received as the Hindoo law in various parts of British *India*. Upon such materials the earlier works of European writers on the Hindoo law, and the earlier decisions of our Courts, were mainly founded. The opinion of a *Pundit* which is found to be in conflict with the translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the Country. A considerable body of these *futwas*, or opinions, is collected in the third part of what has been called throughout the argument in this case the "Green Book." It is not necessary to consider, whether they can all of them be supported to the full extent of what they affirm. But they show a considerable concurrence of opinion, to the effect that, where the authority of her Husband is wanting, a Widow may adopt a Son with the assent of his kindred in the *Drávada* Country.

The decided cases, exclusive of those in the *Bombay* Presidency, which may be taken to be governed by the *Muyookhu*, are certainly not many. But there is at least the case G. (a), decided by the late *Sudder* Court of *Madras*, and there are the French cases, which ought not, their Lordships think, to be wholly disregarded as recognitions of the law prevailing in the South of *India*. They are to be relied on in this case as affording evidence of a long continued series of opinions officially given, and judicially received, which

(a) *Appaniengar v. Alemaloo Ammal*, Mad. Sud. Dec., for 1858, pp. 5, 6.

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were adopted as the grounds of decision, showing a continued and recognized existence of a doctrine, which suffices to remove from the opinions of the *Pundits* in this case every suspicion of being opinions given to support the interests or judgments of others. Against these authorities the Appellants have invoked that of the case of *Raja Haimun Chull Sing v. Koomer Gunsheam Sing* (2 Knapp's P. C. Cases, p. 203). But what was, in fact, decided by the very guarded judgment delivered by the late Lord *Wensleydale* in that case? It was that, according to the native text-writers—including probably *Vasishta*, certainly including the *Dattaca Mimansa* of *Nanda Pandita*—the authority of the Husband was a requisite to a valid adoption; that the strictness of the law had been in many districts, and particularly in the *Mahratta* States, relaxed or modified by local usage, but that it had not been established to their Lordships' satisfaction that that relaxation had extended to the particular District of *Etawah*, in Upper *India*. Disclaiming, therefore, the intention to decide what was the law in other parts of *India*, their Lordships held, that they could not say that the law in that District did not require the direction of the Husband in order to the validity of an adoption, which it was necessary for them to do in order to reverse the judgment of the Court below. It is clear that that decision was not intended to govern, and cannot be taken to govern, a case arising in the South of *India*.

Upon the whole, then, their Lordships are of opinion, that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the *Dravada* Country, and particularly

in that part of it wherein the *Ramnad zemindary* is situate, a Hindoo Widow, not having her Husband's permission, may, if duly authorized by his kindred, adopt a Son to him. And they think that that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindoo law, or upon analogies, real or supposed, between adoptions according to the *Dattaca* form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased Husband by carnal intercourse with the Widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient Treatises above referred to, and in particular by the *Dattaca Mimansa* of *Vidya Narainsamy*, the Author of the *Madhavyam*; but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention.

It must, however, be admitted that the doctrine is stated in the old Treatises, and even by Mr. *Colebrooke*, with a degree of vagueness that may occasion considerable difficulties and inconveniences in its practical application. The question who are the kinsmen whose assent will supply the want of positive authority from the deceased Husband, is the first to suggest itself. Where the Husband's family is in the normal condition of a Hindoo family—*i.e.* undivided—that question is of comparatively easy solution. In such a case the Widow, under the law of all the Schools which admit this disputed power of adoption, takes no interest in her Husband's share of the joint estate, except a right to maintenance. And

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though the Father of the Husband, if alive, might, as the head of the family and the natural Guardian of the Widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no Father, the consent of all the Brothers, who, in default of adoption, would take the Husband's share, would probably be required, since it would be unjust to allow the Widow to defeat their interest by introducing a new co-parcener against their will. Where, however, as in the present case, the Widow has taken by inheritance the separate estate of her Husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the Husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos. Their Lordships do not think there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think, that the consent of the Father-in-law, to whom the law points as the natural Guardian and "venerable protector" of the Widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no Father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the Widow in the proper and *bonâ fide* performance

of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question, that the consents were purchased, and not *bonâ fide* attained. The rights of an adopted Son are not prejudiced by any unauthorized alienation by the Widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption.

Again, it appears to their Lordships that, inasmuch as the authorities in favour of the Widow's power to adopt with the assent of her Husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the Husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supercession of heirs on the ground of religious obligation to adopt a Son in order to complete or fulfil defective religious rites.

Their Lordships having thus stated the conclusions to which they have come upon the general question of law involved in these appeals, will now consider whether the High Court of *Madras* has correctly applied that law to the facts of the present case.

They are of opinion, that both the Courts below were right in holding that the collateral kinsmen of *Ramasamy* were to be found in the *Taver* family, of which the printed pedigree forms part of the record.

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According to Hindoo law, *Ramasamy* was the Son, though by adoption, of *Annasamy*; and he again was the Son, though by adoption, of the first *Ramasamy*, who was a *Taver*; and the heirs of *Ramasamy*, in the absence of descendants, were traceable upwards through these two persons, as if they had been his natural Father and Grandfather. There is no ground for saying that this, the legal consequence of the successive adoptions, was affected by the assumption of the name of *Sathupathy*, the family name of the ancient *Zemindars* of *Ramnad* and of *Mangalswara*, the Grantee of the *zemindary*. It is to be observed, however, that this line affords none but very remote kinsmen, if their relationship to *Ramasamy* be calculated on the principle just stated. The nearest of them, *Mootoosamy*, would on that principle stand in a degree of relationship to *Ramasamy* which, according to the rule of the *Mitácshará* (cap. 2, sec. v., art. 6), would exclude him from the category of *Sapindas*, and place him in that of *Samánódacas*, or those connected only by a libation of water and a common family name. He was, however, the natural Brother of *Annasamy*, and that circumstance might strengthen his title to be considered, in the absence of nearer connections, the natural male protector of *Ramasamy's* Widow. Again, the person who really filled the office of Protector, and that by the express appointment of *Ramasamy*, was, up to the time of her quarrel with her Daughter-in-law, *Mootoo Veroyee*. Nor is it by any means unusual in a Hindoo family to find the Mother-in-law occupying a position of considerable power and importance. Moreover, she was unquestionably the heir to the property next in succession to *Ranee Parvata Nachear*, after the failure of *Rama-*

samy's descendants. It, therefore, appears to their Lordships, that in this state of the family the assent of *Mootoo Veroyee*, of *Mootoosamy*, and of the other persons who are proved beyond all question to have assented, was sufficient to legitimate the adoption, even if the evidence has failed to prove the consent of the yet remoter kinsman, *Ramrajah Taver*.

It has been argued, however, that even if this adoption would have been regular had *Ramasamy* died childless and intestate, his *arzi* relating to the management and descent of the *zemindary* contains an indication of his intention that his Daughters and their descendants should be his successors and representatives, which ought to be taken to imply a virtual prohibition of the act of adoption by his Widow. Their Lordships cannot accede to this argument. *Ramasamy*, no doubt, intended to be represented by his Daughters' line, should that line continue. But he made no express provision for its failure, and the same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt, when on a new and unforeseen occasion the religious duty arises. His Widow has not claimed a power to adopt, except on the happening of the contingency for which her Husband omitted to provide. And her power so limited, not having been qualified by his disposition, must be determined by the general law.

Another argument for the Appellants was founded on the attempted adoption of a Son, *Annasamy*, by *Dorarajah*. That person is not a party to either of these suits; he has not impeached the adoption of the Respondent, *Ramalinga*; he has, on the contrary,

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supported it as a witness. Nothing decided by the decrees under appeal can prejudice his rights, if he has any, under an adoption which the Revenue authorities at the date of it seem to have treated as illegal. Their Lordships have not before them the necessary materials for determining, whether that adoption was in fact valid or invalid; or whether, if valid, it would have any, and what effect on the title of the Respondent, *Ramalinga*. In that state of things neither of the present Appellants can be allowed to insist on this supposed *jus tertii* as an objection to the decrees which they impeach.

Their Lordships have, therefore, come to the conclusion, that these decrees, and the judgment on which they proceed, are substantially right, in so far as they affirm, as between the parties to this litigation, the validity of the adoption by *Ranee Parvata Nachear* of the Respondent, *Ramalinga*.

They also think that there is no foundation for the other and minor objection taken by the Collector to the decree of the 18th of *March*, 1861, on the ground that it asserts a power in *Ranee Parvata Nachear* to alienate or affect the *zemindary* beyond her life interest. Her power of alienation is expressly stated to be "subject to the provisions of Hindoo law;" and the only object of that part of the decree was to affirm her right to exercise that power within the limits prescribed by the Hindoo law, free from the control of the Government or its Revenue Officers.

Their Lordships are further of opinion, that there are no grounds for impeaching the decree of the 12th of *April*, 1861, in so far as it found that the Appellant, *Ranee Kunjara*, stood in the relation only of stepmother to *Ramasamy*, and, therefore, could have

no right to inherit his estate. They think, that this conclusion is supported by the Will of *Ranee Mootoo Veroyee*, dated the 20th of *January*, 1820, which expressly states that *Ramasamy* was adopted by *Annasamy* and *Ranee Mootoo Veroyee* unanimously.

Upon the cross appeal their Lordships have only to observe, that the *quantum* of maintenance is a question with which the Courts of *India*, having local knowledge, and being conversant with the habits of native families, are peculiarly competent to deal with; and that strong grounds should be shown to justify any interference by this Committee with their discretion in that matter. And their Lordships see no reason for questioning the soundness of the discretion exercised by the High Court of *Madras* in the present case.

Being, therefore, of opinion, that the decrees under appeal are correct, and ought to be affirmed, their Lordships will humbly recommend to Her Majesty that the two appeals and the cross appeal be each dismissed, with costs.

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GRIDHARI LALL ROY ... *Appellant,*

AND

THE BENGAL GOVERNMENT ... *Respondent.**

On appeal from the High Court of Judicature at Fort William in Bengal.

29th & 30th
June,
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IN this appeal the suit was brought by the Bengal Government against the Appellant, to establish

The Crown has, under the 21st & 22nd Vict., c. 106, only the same rights that the late East

* Present :—Members of the *Judicial Committee*—Lord Romilly (the Master of the Rolls), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and Sir Fitz-Roy Kelly (the Lord Chief Baron of the Exchequer).

Assessor :—The Right Hon. Sir Lawrence Peel.

India Company possessed previous to the passing of that Statute.

In ejectment, the Government can only recover by strength of its own title.

So held in a suit by the Government claiming lands by escheat, in which it was admitted, that the Defendant's possession was as heir; the *onus* being on the Government, to show that the last proprietor died without heirs.

The enumeration of *Bandhoos* (cognate kindred) capable of inheriting, in preference to the right of the King to succeed, contained in the translation of the *Mitácshará* by *Colebrooke*, ch. II., sec. 7, held to be illustrative and not exhaustive.

A translation of a passage by *Yajnyawalcya* (the Author of the *Mitácshará*), enumerating the preferential heirs, including among *Bandhoos* the Father's maternal Uncle, not contained in *Colebrooke's* translation, received and acted upon in determining the law of succession of a Hindoo governed by the *Mitácshará*.

The *Viromitrodaya* by *Mitramisira*, is an authority to be looked to, of what may have been left doubtful by the *Mitácshará*, and as declaratory of the law of the *Benares* school.

A Hindoo, whose succession was regulated by the *Mitacshara*, and the law of the *Benares* school, died without leaving any nearer relative than the Brother of his Grandmother, *ex parte paterna*. He performed the *Stradh* to the deceased. Held (reversing the decree of the High Court at *Calcutta*), upon the construction of the *Mitácshará* as expounded by the *Viromitrodaya*, that the maternal Uncle of the Father is a *Bandhoo*, a cognate or kindred relation of the Father, and, failing nearer *Bandhoos* of the deceased, was entitled to inherit, as a relation of the deceased, by a title preferable to that of the Crown, claiming by escheat for want of heirs.

the title of the Government, first, on the ground of an escheat, to a *zemindary* situate in the *Zillah Rungpore*, as well as the movable property which had belonged to one *Woopendro Chunder Roy*, who had died without issue, and also, as it was alleged by the Government, without leaving any other person who was by the Hindoo law entitled to succeed as heir to his immovable and movable estate; and, secondly, to eject the Appellant from possession of the *zemindary*.

The principal question raised in the Court below and on appeal, had reference to the construction and effect to be given to the undermentioned passage in the *Mitacshara*, and involved the point, whether the Appellant, as the maternal Uncle of the deceased Father of *Woopendro Chunder Roy*, was excluded from the line of succession, although he was a *Bandhoo*, a cognate relation of the deceased, and although it is laid down generally, that *Bandhoos* after *Sapindas* and *Samanodacas* do succeed as heirs, yet that the Father's maternal Uncle and the maternal Uncle are not specifically named in the *Mitacshara*, ch. II., sec. 6, while the Son of each of these relations is therein expressly named as included among heirs.

The passage of the *Mitacshara* in question is as follows:—

“ ‘ On failure of Gentiles (that is, the *Samanodacas*, to the fourteenth generation), the cognates are heirs.’ Cognates are of three kinds :—related to the person himself, to his Father, or to his Mother, as is declared by the following text:—‘ The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his own maternal Uncles, must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, and Sons of his Father's

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maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's cognate kindred ' ' (a).

Two other questions were also raised: first, whether the Government, who claimed by escheat, was not estopped from disputing the title and legal possession of the Appellant by reason of the Board of Revenue having formally recognized his title after investigation thereof, and recording his name as proprietor of the *zemindary* in succession to, and as legal heir of, *Woopendro Chunder Roy*; and second, whether an adopted Son of the Appellant was entitled to succeed as such heir, the Son of the maternal Uncle of a Father being named in the list of *Bandhoos* entitled to inherit in the above passage of the *Mitacshará*, in case it should be held, that the Appellant himself was not to be considered entitled to succeed as heir, on the ground that the maternal Uncle of a Father was not expressly mentioned in the passage above-mentioned.

It appeared from the evidence, that on the death of *Woopendro Chunder Roy*, the Appellant claimed to succeed to the inheritance, according to the law received in the *Benares* School, as standing in the relation to the deceased of Father's maternal Uncle, and as such, being the nearest male relative, he performed the *Stradh*, or funeral ceremonies of the deceased as next heir, and obtained possession of the *zemindary*.

The Appellant's degree of relationship was admitted by the Government, the Board of Revenue

(a) *Mitacshara*, ch. II. sec. 6. Translated by *Colebrooke* in his *Treatise on Inheritance*, p. 352.

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having, upon an application for mutation of names, recognized his title to possession, and recorded his name as proprietor of the *zemindary* in the Collector's Books, and it appeared that he had continued to pay the Government revenue assessed upon the *zemindary* from that time until the institution of the suit which led to this appeal. There were two other Claimants to the succession, named *Sohun Lall* and *Mohun Lall*, who represented themselves to be maternal Grandmother's Sister's Sons. The spiritual preceptor of the deceased also set up a title as heir.

The suit was in the nature of an action of ejectment. By the plaint the Government claimed possession from the Appellant of the immovable estate and movable property of *Woopendro Churder Roy* as an escheat, on the ground of the deceased having died without heirs, and stated, that there was no other means than by such suit to obtain possession, as the Appellant, claiming as the maternal Uncle of *Ram Chunder Roy*, the Father of the deceased, held and kept possession of the property under that title.

The Appellant by his answer insisted, that the *zemindary* and other property could not escheat while there were heirs in existence; that he and his adopted Son were legally entitled as heirs of the deceased, and submitted, that even if it were not so, Government was estopped from disputing his right by the recognition of his title as before stated.

There was evidence, that the religious ceremonies of the Family were performed according to the *Mitácshará* and the *Viromitrodáya Shastras*.

By the decree of Mr. *F. C. Fowle*, the Judge of the *Zillah Rungpore*, dated the 28th of *September*, 1864, it was decided that, according to general rule of law, the *onus* of proving a failure of heirs of *Woopendro*

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Chunder Roy, deceased, the late proprietor, and a consequent vacant possession, lay on the Government, as claiming the property under an escheat from failure of heirs, and that their title could not arise while there was any person entitled to succeed by consanguinity to the deceased; that, it being admitted on the pleadings, that the Appellant was the grand-Uncle of *Woopendro Chunder Roy*, and as the order of succession laid down in the before set out passage of the *Mitacshara* was entirely based on, and governed by affinity or consanguinity, the Appellant was, according to the spirit of the text of the *Mitacshara*, to be considered the next heir of the deceased, and as such, legally entitled to hold possession of the property: and the decree accordingly dismissed the suit of the Government, with costs.

There was an appeal from this decree to the High Court at *Calcutta*, and that Court, consisting of Messrs. *C. B. Trevor* and *G. Campbell*, by their judgment, dated the 30th of *August*, 1865, reversed the decree of the *Zillah* Judge, deciding against the Appellant's title as heir in succession, on the ground of the omission from the passage in the *Mitacshara* of the name of the Father's maternal Uncle. The Judges of the High Court, in delivering judgment, admitted, that there was no decision of the Courts on the point in question. They referred, however, to the following authorities, regarding a Sister's Son and a Brother's Daughter's Son, who were admitted to be *Sapindas* in the sense used in the *Mitacshara*, and *Bandhooos* also, as applicable to the question at issue, *Nagalinga Pillai v. Vardilinga Pillai* (Dec. of Sud. Court, 1860, p. 245); *Doe Dem Kalammal v. Kurppas* (1 Mad. High Court Reps. p. 85 to 91); *Chotee Lall v. Goordyal* (Rep. of the Sud. Dew.

Ad. (N. W. P.) for *March*, 1865, p. 200); *Kias Koomar v. Agund Roy* (7 Sel. Reps. p. 37 to 40); *Jowahir Ra-hoor v. Mussamat Koilasse* (1 Weekly Rep. 74); *Bis-umbhur Sahoo v. Bhyrub Sahoo* (Legal Remembrancer for 1864, pp. 168, 169); *Jumun Bibee v. Mussumat Golab Debee* (1 Agra Law Journ. 17). The High Court, by its judgment, reversed the decree of the *Zillah* Court, and decreed possession of the property to the Government as an escheat, on an entire failure of legal heirs.

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Sir *R. Palmer*, Q.C., and Mr. *Leith*, (with whom was Mr. *E. P. Wood*.) for the Appellant, and

Mr. *Forsyth*, Q.C., and Mr. *Merivale*, for the Bengal Government.

On the opening of the appeal a preliminary objection was taken by the Appellant to the right of the Government to sue. It was submitted, that the suit being in the nature of ejectment, the *onus* was upon the Government, to establish a clear title by escheat by showing an entire failure of legal heirs of the late *Woopendro Chunder Roy*, the *Zemindar* last seised, according to Hindoo Law, and a consequent vacant succession, which, it was contended, the Government failed to do, and was not entitled to rely on the weakness of the title of the Appellant, who had been put in possession by the Government.

The *Lord Chief Baron*: In this Country in a Writ of intrusion, or Ejectment, the Crown must, to take lands by escheat, prove that there was an entire failure of heirs, and so also a Lord of a Manor with respect to Copyholds on the death of a Tenant without heirs, and cannot rely upon the want of title of the party

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in possession. The Government must show a good title. Here they have shown none.


For the Bengal Government it was contended, first, that by the Hindoo Law, the Appellant, the maternal Uncle of the Father of the party last seised, had no title as heir, and that the Government was not bound to prove a negative that there were no heirs; and secondly, that there were other parties claiming as heirs, citing *The Collector of Masulipatam v. Cavalry Vencata Narrainapah (a)*. [Sir Lawrence Peel: The Crown has not under the Statute, 21st & 22nd Vict. c. 106, transferring the Government of India to the Crown, a higher title than the late East India Company had. If the East India Company had claimed lands upon the ground of the extinction of the immediate tenantry, they must have proved their title in the same manner as a party claiming under a remote remainder would have to prove extinction of the previous heirs. There appears to be other parties who are entitled.] A judgment against the Appellant would not operate as a bar to a party who claimed, showing a title as heir. It is admitted that the Government had not given affirmative evidence of the non-existence of heirs.

Lord ROMILLY:—

Their Lordships wish to ask the Appellant's Counsel, whether they have anything to say to the judgment they are prepared to pronounce, namely, that without deciding the rights of the parties, to dismiss the appeal from the *Zillah* Court and to reverse the judgment of the High Court at *Calcutta*, liberty being given to the Respondent to institute fresh proceedings for the purpose of establishing the right of the Crown by escheat.

(a) 8 Moore's Ind. App. Cases, 500.

Sir *R. Palmer* declined to accede to the proposed judgment, and claimed the right to be heard on the merits.

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Upon the question, whether by the Hindoo law received in the *Benares* School, the Appellant, as Father's maternal Uncle, was entitled as at *Bandhoo* to succeed as heir to *Woopendro Chunder Roy*, in preference to the claim of the Crown by escheat; the following authorities were cited: The *Mitacshara* (Trans. by *Colebrooke*), ch. II. sec. vi.; *Stokes'* "Hindu Law," p. 448; The *Viromitrodaya* (a); *Stokes'*

(a) The passage quoted from the *Viromitrodaya*, p. 209, is translated in Mr Justice *Bayley's* judgment, in the case of *Amreto Kumari v. Lukhynarayan Chukurbully* (9 Sevestre's Sel. Cases, 547-552), as follows:—"In default of *Samanodakas*, *Bandhoos* (cognates) are heirs. Cognates are of three kinds,—related to the person himself, to his Father, or to his Mother. According to the following text: 'The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his maternal Uncle, must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, the Sons of his Father's maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned his Mother's cognate kindred. Then, by reason of near affinity, the cognate kindred of the deceased himself, in the first instance; then the Father's cognate kindred, and next his Mother's cognate kindred, succeed.' This is the order of succession. In the text of *Menu*: 'Then the distant kinsman shall be the heir, or the spiritual preceptor, or the pupil;' the term *Sakulya* comprehends the persons descended from the same family (*Sagatra*), and the kinsman allied by common libation of water (*Samanodaka*); the maternal Uncles and the rest; and the three kinds of cognates. The term cognate (*Bandhoos*) in the text of *Jageeshwara* or *Jagyavalkya* must comprehend also the maternal Uncles, and the rest; otherwise the maternal Uncles and the rest would be omitted, and their Sons would be entitled to inherit and not they themselves, though nearer in the degree of affinity. A doctrine highly objectionable."

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"Hindu Law," pp. 176-8; The *Daya-Bhaga*, ch. XI. sec. vi. pl. 12; *Stokes' "Hindu Law,"* p. 346, 352-3; The *Daya-Krama-Sangraha*, ch. II. sec. vi; *Stokes' "Hindu Law,"* p. 499; *Strange's "Hindu Law,"* Vol. I., pp. 147-8, 317 [2nd Ed]; *Dattaka Mimansa* of *Nanda Pandita*, sec. II. p. 29 (Trans. by *Sunderland*); *Morley's Dig.*, Vol. I. Pref. ccxxi.; *Elberling* on Inheritance, pp. 81, 2, 3; and an English translation of the principal maxims of *Mitacshara Grunthoo* (a); *Amreto Kumari v. Lukhynarayan*

(a) This document, described as an English translation of the principal maxims of the *Mitacshara Grunthoo*, was put in evidence by the Defendant, and received and acted upon by the Courts in *India* and on appeal. As it differs in some respects from the translation by *Colebrooke*, it is set out entire :—

"The Wife and the Daughters also, both Parents, Brothers likewise, and their Sons, gentiles, a pupil, and fellow-student. On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven (died), leaving no male issue. This rule extends to all persons and classes. (See *Colebrooke's 'Translation of the Mitacshara,'* ch. II. sec. i. pl. 1. p. 324.)

"On failure of gentiles, the cognates (*Bandhoos*) are heirs. Cognates are of three kinds,—related to the person himself, to his Father, or to his Mother, as is declared by the following text :— 'The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his own maternal Uncle must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, the Sons of his Father's maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned his Mother's cognate kindred.'— (*Colebrooke's 'Translation of the Mitacshara,'* ch. II. sec. vi. pl. 1. p. 352.)

"Here, by reason of near affinity, the cognate kindred (of the deceased himself) are his successors, in the first instance; on the failure of them, his Father's cognate kindred; in default of them, his Mother's cognate kindred. This is the order of succession. (Translation of the annexed passage of the *Viromitrodya*, copied from the Book which is in the library of the Government Sanscrit College.)

Chukurbutty (a), referring to a passage in the *Mitacshara (b)* not translated by *Colebrooke*; *The Collector*

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"The term *Sakulya* (distant kinsman) used in the following text of *Menu*,—'Then the distant kinsman shall be the heir, or spiritual preceptor, or the pupil,' comprehends the persons descended from the same ancient sage (*Sa Gutra*), and the kinsmen, allied by common libation of water; the maternal Uncles and the rest, and the three kinds of cognates. The term 'cognate' (*Bandhoo*) in the text of *Jagishwara* or *Janavalkya*, must comprehend also the maternal Uncles and the rest; otherwise the maternal Uncles and the rest would be omitted, and their Sons would be entitled to inherit, and then they themselves, though nearer in the degree of affinity; a doctrine highly objectionable.—*Viromitrodaya*. (Translation of the annexed passage of the *Viromitrodaya*, copied from the Book which is in the library of the Government Sanscrit College.)

"Therefore, the summary of the above-mentioned heirs is this:—First, the Son; on failure of him, the Grandson; in his absence, the Grandson's Son; on failure of him, a chaste wife; in her default, the Daughters; in their absence, the Mother; in her default, the Father; and in his default, the Daughter's Son; and in default of him, the Brother; in his default, the Brother's Son; and on his death, the nearest kinsmen; in default of them, the remotest kindred, according to their order; in default of all these, the nearest *Sakulya*; on failure of them, the remotest *Sakulya*; in their absence, Maternal Uncles and others.

"But on failure of all these heirs, the King inherits, except the property of a *Brahmana*, which goes to another *Brahmana*.—*Vivada Chinta Chintamani*.—(*Vide Baboo Prossonno Coomar Tagore's* translation of the *Vivada Chintamani*, p. 299.)

"A true translation of the annexed Sanscrit paper.

"(Signed) *Shama Churn Sircar*,
"Chief Interpreter and Translator, High Court."

(a) 9 Sevestre's Reps. of Select Cases, 547.

(b) This passage was as follows: "When one having gone to a Foreign country dies, let the descendants, cognates (*Bandhoos*), gentiles, or his companions take the goods. In their default, the King. When of those who are associated in trade, any one, having gone to a Foreign country dies, then his share shall be taken by his heirs, *i.e.* the Son and other descendants, cognates, *Bondhava*, *i.e.*

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of *Masulipatam v. Caval Vencata Narainapah (a)*; *The Collector of Madura v. Moottoo Ramalinga Sathupathy (b)*; *Venayeck Anundrow v. Luxumee-bace (c)*; *Nagalinga Pillia v. Vardilinga Pillia (d)*; *Surja Kumari v. Gaudhrap Singh (e)*; and *Lakhi Priya v. Bhavirab Chandra Chandhuri (f)*.

Their Lordships reserved the consideration of their judgment, which was now pronounced, as follows, by

The Right Hon. Sir JAMES W. COLVILE.

The facts on which the determination of this appeal depends are few and undisputed. *Woopendro Chunder Roy*, the owner of the *zemindary* and other property in dispute, died on the 7th of *August*, 1860, an infant, and unmarried. He was of a family which had formerly come from the Upper Provinces, and, though settled in Lower *Bengal*, where the *zemindary* is situated, is admitted to have retained the ceremonial and other law of its original habitat. There is, the Mother's side relatives, the maternal Uncles and others, the Gentiles, *i.e.* the *Sapindas*, besides the Son and other descendants, and those who are come, *i.e.* those associated in trade who come from a Foreign country. In their default, *i.e.* in default of descendants, &c., let the King take. By the word *ba*, (or) [the Sage] shows their right severally. The rule as to the order contained in [the text] the Wife, Daughters, &c, is also understood for this place. The necessity for the text is to exclude the Pupil, the fellow Students, the Brahmin, and to include the Trader."—(*Mitacshara*, p. 322, Ed. 1829) This translation is taken from the judgment of Mr. Justice *Bayley*, in the case of *Amreto Kumari v. Lukhynarayan Chukurbully*, 9 Sevestre's Sel. Cases. p. 551.

(a) 8 Moore's Ind. App. Cases, 525.

(b) *Ante*, p. 397.

(c) 9 Moore's Ind. App. Cases, 516.

(d) Dec. of Sudder Court, 1860, p. 245.

(e) 6 Ben. Sud. Dew. Ad. Rep. 142.

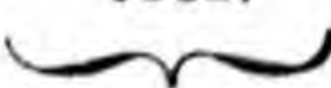
(f) 5 Ben. Sud. Dew. Ad. Rep. 315.

therefore, no dispute that any question touching the succession to *Woopendro Chunder Roy* is determinable by the law of inheritance current at *Benares*.

On *Woopendro Chunder Roy's* death the Appellant, as the nearest male relative surviving him, performed his *Stradh*, claimed his property as heir, and shortly afterwards applied to have his own name substituted for that of the deceased as owner of the *zemindary* on the Collector's register. He is, however, but a remote kinsman of the deceased, being only the Brother of his Grandmother *ex parte paternâ*, or, to use the phraseology of the *Mitacshará*, his Father's maternal Uncle. And accordingly, at the time of this application for mutation of names, some question, whether the Appellant was entitled to inherit, and whether the property did not pass for want of heirs to the Crown, was raised. Thereupon the Board of Revenue consulted their adviser, the Legal Remembrancer, and on his opinion, fortified by that of a *Pundit* which he had procured through the Registrar of the High Court, determined to recognize the title of the Appellant, who accordingly was put into possession, or left in possession of the property, recorded as proprietor of the *zemindary* in the Collector's Books, and continued to pay the Government revenue assessed upon it up to the date of the institution of this suit.

In 1863, the Government authorities appear to have changed, for reasons which have not been explained, their view of the Appellant's title; and on the 3rd of *August* in that year the suit out of which this appeal has arisen was commenced against him in the name of the Government of *Bengal*, as representing the Crown, for the recovery of the real and

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personal property of *Woopendro Chunder Roy*, on the allegation, that upon his death it had escheated, for want of heirs, to the Crown.

By a decree, dated the 28th of *September*, 1864, the *Zillah* Judge dismissed the suit, holding that the Government was not entitled to oust the Appellant. The precise grounds of his judgment it is unnecessary to examine.

On appeal to the High Court, this decision was reversed by two of the Judges of that Court, and the present appeal has been preferred against their decree.

The points ruled by the judgment of the High Court were,—

First, that the Government was not estopped by the acts of its Officers in 1861, when the Appellant applied for and obtained the mutation or names, from bringing this suit.

Second, that upon the true construction of the section in the *Mitácshará*, which will be hereafter considered, the Appellant, as the maternal Uncle of the Father of the deceased, was excluded from the class of *Bandhoos* capable of inheriting; and that consequently, as between him and the Government, he had no title to the property sued for.

Upon these findings the Court decreed, that the Government should obtain possession of all the real property admittedly in the Appellant's possession, with a certain specified exception, but that, for want of proof as to its value, their claim to the movable property should be dismissed; and the judgment then proceeded as follows:—"This decree of the Government against *Gridhari* is final, but it does not become absolute until the claim of *Sohun Loll Lall* and *Mohun Lall*, who represent themselves to be maternal Grandmother's

Sister's Sons, and that of *Harro Bhoja Misser*, the spiritual preceptor of the deceased, have been inquired into. The last-named person has filed no evidence, but his claim cannot be determined until that of *Sohun Lall* and *Mohun Lall* has been set at rest, and they have filed no evidence at all. They, as well as the *Acharjee*, or spiritual preceptor, do not oppose the Defendant, *Gridhari's* claim, but only prefer a claim in case his is declared to be invalid; and if they prove themselves to be what they allege that they are, they are undoubtedly entitled to succeed as enumerated *Bandhoos*. The case must, therefore, be remitted to the Judge, with instructions that he will, without delay, take up the case, and call on these parties and any others who may appear to claim the property of the deceased minor, within a reasonable time to file their evidence. He will then examine it thoroughly, and, guided by his estimate of it, and by Hindoo Law, he will either confirm the present Order in favour of Government as against them also, or pass in their favour whatever decree the law of the case seems to require."

The able arguments before this Committee have been principally addressed to the question raised by the second of the above findings, viz. whether under the law current at *Benares* the Appellant has not a title to inherit the property preferable to the claim of the Government by escheat; and that question their Lordships will first consider.

Its determination will ultimately be found to depend on the construction to be given to the first article of the sixth section of the second chapter of the *Mitácshará*. The absolute exclusion of the Father's maternal Uncle from the list of possible heirs, for

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which the Respondent contends, can rest on no other ground.

Mr. *Forsyth*, indeed, argued strongly against the right of the Appellant to inherit, on the assumption that he was not entitled to offer the funeral oblations. But is this assumption well founded? There is evidence, the uncontradicted evidence of the family Priest and others, that the Appellant did, in point of fact, perform the *Stradh* of *Woopendro Chunder Roy*, and he seems, in the judgment of the Priest, properly to have performed that function in the absence of any nearer kinsman. It is, however, unnecessary to determine whether this act of the Appellant was regular or not. The issue in this case is not between two competing kinsmen, but between a kinsman of the deceased and the Crown. Let it be supposed, for the sake of argument, that the nearest existing relative of *Woopendro Chunder Roy* at the time of his death had been, not the Appellant but a natural-born Son of the Appellant. It is admitted that, on the strictest interpretations of the *Mitácshará*, such a person is a *Bandhoo*; that the three classes of *Bandhoos* must be exhausted before the King can take for want of heirs; and, therefore, that the title of the Appellant's Son would prevail against the Crown. Now, such a *Bandhoo* either is competent to perform the *Stradh* of the deceased, offering some kind of funeral oblation, or he is not. If he be incompetent, it follows that his right to inherit is wholly independent of the doctrine of spiritual benefits derivable from funeral oblations, and is determined solely by kinsmanship. If he be competent, it follows *à fortiori*, that his Father, who would have been one degree nearer akin to the deceased, would also have been competent; and that

his exclusion from the line of inheritance, if it exists, depends upon some other principle.

It is impossible to read the second chapter of the *Mitacshara* without remarking the extreme jealousy with which the Hindoo law regarded the right of the King to take on a failure of heirs. The seventh section refuses altogether to recognize that right where the property was that of a Brahmin. Admitting it as to the property of the other castes or classes, it expressly says, "if there be no relations of the deceased, the Preceptor, or, on failure of him, the Pupil;" and again, "if there be no Pupil, the fellow-student is the successor." It thus exhausts the relatives and then interposes between them and the King three classes of heirs not connected with the deceased by blood, or participation in funeral oblations. The title of the King is afterwards stated in pl. 6 affirmatively, thus, "The King, and not a Priest, may take the estate of a *Cshatriya*, or other person of an inferior tribe, on failure of heirs down to the fellow-student." So *Menu* ordains: "But the wealth of the other classes, on failure of all (heirs), the King may take." So far, then, the law would seem to be clear that the King cannot take the property to the prejudice either of a maternal Uncle, or a maternal Grand-uncle, each of whom is obviously "a relation" of the deceased. What grounds, then, does the sixth section afford for the hypothesis that these two relations are arbitrarily excluded from the list of possible heirs? The sixth section begins by stating broadly, "On failure of gentiles, the *Bandhoos* (rendered by Mr. *Colebrooke* 'cognates') are heirs." Much has been said about this word "*Bandhoo*." It seems (see note at page 350 of *Colebrooke's* translation of the *Mitacshara*) to be

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sometimes used as equivalent to "kinsmen" generally. But in this particular section it may be taken, as defined elsewhere by the *Mitácshará* itself, to import kinsmen springing from a different family (and therefore opposed to "*gotraya*" or "gentiles") and connected by funeral oblations. From this class the maternal Uncle, or the Father's maternal Uncle (assuming their connection with the deceased by funeral oblations) can be excluded only by some arbitrary definition. Such a definition the Respondents contend is found in the passage which immediately follows the last citation from the *Mitácshará*. But is that necessarily so? The Author of that Treatise goes on to state, in sec. VI., "Cognates (*Bandhoo*) are of three kinds; related to the person himself, to his Father, or to his Mother, as is declared by the following text." And then follows, as a quotation, a more ancient text, the authorship of which seems, from Mr. *Colebrooke's* note, to be uncertain, which says, "The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his own maternal Uncle, must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, the Sons of his Father's maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned amongst his Mother's cognate kindred."

This subdivision of *Bandhoos* into three classes is possibly a consequence of that part of the definition already referred to, which treats them as kinsmen connected by funeral oblations. It may be, that the *Bandhoos* of the parent, though connected with him

by funeral obligations, would, by reason of remoteness of kinship, not be so connected with the Son.

If, for the determination of the question under consideration, their Lordships were confined to the four corners of the *Mitácshará*, they would feel great difficulty in inferring, from the omission of "the maternal Uncle" and "the Father's maternal Uncle" from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindoo in preference of the King. Such an inference, in the teeth of the passages which say that the King can take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all *Bandhoos* who are capable of inheriting, nor is it cited as such, or for that purpose, by the Author of the *Mitácshará*,—it is used simply as a proof or illustration of his proposition, that there are three kinds or classes of *Bandhoo*; and all that he states further upon it is, the order in which the three classes take, viz., that the *Bandhoos* of the deceased himself must be exhausted before any of his Father's *Bandhoos* can take, and so on.

Again, further doubt is thrown upon the theory of exhaustive enumeration by the passage of the *Mitácshará*, which is not found in that portion of the Treatise which was translated by *Colebrooke*, but has been translated for the purposes of this suit, and is stated in the record (a). The general effect of that passage is to introduce, in the case of a Trader dying abroad, a new class of

(a) See *ante*, p. 456.

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remote heirs, viz., his returning co-traders. But this provision is preceded by an enumeration of preferable heirs which includes among *Bandhoos* the maternal Uncle. Here, then, is a passage, written by the Author of the *Mitácshará* himself, which treats the maternal Uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal Uncle, as well as that of the co-trader, may be exceptional, and confined to the case of the Trader dying abroad. Their Lordships, however, cannot admit the reasonableness of this hypothesis, and think that even on the *Mitacshara* the question under consideration is at least uncertain. That question, however, is not to be governed by the *Mitacshara* alone. Adhering to the principles which this Board lately laid down in the case of *The Collector of Madura v. Moottoo Ramalinga Sathupathy* (a), their Lordships have no doubt that the *Viromitrodaya*, which by Mr. *Colebrooke* and others is stated to be a Treatise of high authority at *Benares*, is properly receivable as an exposition of what may have been left doubtful by the *Mitacshara*, and declaratory of the law of the *Benares* school.

The passage cited from that Commentary in the record, and more fully in *Amreto Kumari v. Lukhynarayan Chukurbutty*, (9 Sevestre's Reports of Cases in the High Court, p. 552), is explicit. After stating that the term *Sakulya*, or distant kinsman, found in the text of *Menu*, comprehends the three kinds of cognates, the commentator goes on to say,—“The term cognates (*Bandhoos*) in the text of *Jagushwara*, or *Jagyawalkya*, must comprehend also the maternal

(a) *Ante*, p. 397 & 438.

Uncles and the rest, otherwise the maternal Uncles and the rest would be omitted, and their Sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity: a doctrine highly objectionable." The passage, as translated in the record, has "then they themselves" in place of "not they themselves." If this be the correct reading, it would follow that even if the exclusion of the maternal Uncle and others not mentioned in the text relied upon by the Respondent from the list of *Bandhoos* were established, they would still, as relations, be heirs, whose title would be preferable to that of the King. But the passage on either view of it declares that they are not so excluded; and it is, therefore, unnecessary to consider whether the title of any remote relation who could not be brought within the category of *Bandhoos*, or other class of heirs specified by the *Mitacshara* would prevail against that of the Crown. The learned Counsel for the Respondent remarked that this passage of the *Viromitrodāya* goes no further than to affirm the right of a maternal Uncle, and that it says nothing of a maternal Grand-uncle. But to say nothing of the use of the term "and the rest," the text is at least an authority for the proposition that a maternal Uncle is a *Bandhoo*. The maternal Uncle of the Father is, therefore, a *Bandhoo* of the Father, and it is admitted that, failing the *Bandhoos* of the deceased, the *Bandhoos* of the Father are entitled to inherit.

This view of the law is confirmed by the majority of the consulted *Pundits*; it seems also to make the law of the *Benares* school consistent on

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the point in question with that of *Bengal*; and the concurrence of opinions of *Mitra-misra*, the Author of the *Viromitrodaya* with *Jimuta Vahana*, the author of the *Daya Bhaga*, is not unimportant, since they are stated by Mr. *Colebrooke* (Pref. p. viii.) to differ on almost every disputed point of Hindoo law.

Their Lordships do not think it necessary to consider at any length the decided cases which are cited in the judgment under review. It is admitted that there is no case precisely in point; and the authority of those cited, in so far as they go to support the theory that the enumeration of *Bandhoo*, in the text quoted in the *Mitacshara*, is to be taken as exhaustive, has been shaken, if not altogether overruled, by the decision which, we are informed, has been recently passed by the High Court of *Bengal* in the case of *Amreto Kumari v. Lukhynarayan Chukurbutty* (7 Sevestre, Sel. Cases, 547). The question under consideration must, therefore, be held to be an open one even in the Courts of *India*.

Their Lordships, then, have come to the conclusion that, according to the law by which this case is to be governed, the Appellant was capable of inheriting the property in dispute, and that his title thereto is preferable to that of the Crown; and therefore, without adopting the reasons given for his judgment, they think that the *Zillah* Judge did right in dismissing the suit. This conclusion necessarily disposes of this appeal. Their Lordships, however, deem it right to add that, even had they agreed with the learned Judges of the

High Court in their view of the law of inheritance, they could not have concurred in the decree under appeal. Their Lordships do not impugn the correctness of the conclusion to which both the Courts below came on the question, whether the proceedings in 1861 estopped the Government from bringing this suit. But the effect of these proceedings was to determine, if it were previously doubtful, the fact of possession. The Respondent, therefore, was in the position of a Plaintiff in an ordinary suit in the nature of an ejectment. The Government could only recover by the strength of their own title. Accordingly, it lay upon the Plaintiff to prove, at least *prima facie*, that *Woopendro Chunder Roy* died without heirs; and, on the other hand, the Appellant was entitled to defend his possession not only by proof of his own title, but by setting up any *jus tertii* that might exist. By an alternative plea he did set up such a bar to the Respondent's suit; and the title of those persons who, he says, are, failing himself, the heirs to *Woopendro Chunder Roy*, has never yet been determined. The decree under appeal would remit the cause to the Judge, in order to allow those persons who, according to the practice in *India*, have intervened as Objectors, to litigate their title with Government, casting, apparently, the burden of proof on them. But it seems to deprive the Appellant of his right to defend his possession, on the ground of an existing *jus tertii*.

It is unnecessary, however, to say more on this point, since the conclusion to which their Lordships have come on the Appellant's own title obliges them humbly to recommend to Her Majesty, that

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the decree of the High Court be reversed, and that in lieu thereof it be ordered, that the appeal to the High Court from the decree of the *Zillah* Judge be dismissed with costs. The Respondent must pay the costs of this appeal.

SREEMUTTY DOSSEE AND OTHERS ... *Appellants,*

AND

RANEE LALUNMONEE AND OTHERS ... *Respondents.**

*On appeal from the High Court of Judicature
at Calcutta.*

19th Feb.,
1869.

Where a Defendant has by his answer put his defence upon a certain ground, and issues for trial are framed by the Court to meet the case so pleaded, the Judicial Committee, as the final

THIS suit, in the nature of an action of ejectment, was brought to oust the Appellant, *Sreemutty Dossee*, from possession of a portion of alluvial land.

The suit was instituted in the *Zillah* Civil Court of the Twenty-four *Pergunnahs* by *Jogendrochunder Roy*, the Husband of the Respondent, *Ranee Lalunmonce*, and his Brother, *Promoochunder Roy*, the

* Present:—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor:—The Right Hon. Sir Lawrence Peel.

Court of appeal, will not determine the appeal upon any other issues or grounds, which have not been taken or considered in the Courts below.

Sons and heirs of one *Hurrishchunder Roy*, as the *Zemindars* of a ten *annas* share of *Kismut Pergunnah Mahomudinapoor* against the Appellants and *Ramkoomar Doss* and *Issurchunder Santra* to obtain possession of fifty-six *beegahs* of *chur* or alluvial land, which they alleged formed a portion of a still larger quantity of *chur* resumed by Government for revenue purposes, and which had been permanently settled with them as being within their *zemindary*, and of which they alleged they had been forcibly dispossessed by the Appellants, and also for mesne profits with interest.

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The question raised by the suit and upon the appeal was the identity of these fifty-six *beegahs*. The material issue recorded by the Principal *Sudder Ameen* was, whether these *beegahs* were included in the permanently settled *chur* of *Ramkristopore* belonging to the Respondents, or were part of a garden belonging to *Sreenath Mullick*, and afterwards purchased by the Appellant, *Sreemutty Dossee*, at a sale under a decree of the late Supreme Court at *Calcutta*. Both Courts in *India* decreed possession to the Respondents. It was from the judgment of affirmance by the High Court at *Calcutta* that the present appeal was brought.

Mr. *Field*, Q.C., and Mr. *Leith*, for the Appellants,

Contended, that the Respondents' right to recover possession of the alluvial land, depended on their establishing by evidence their proprietary right that the land was an accretion and annexed to their *Mouzah Ramkristopore*, which fact they insisted, the Respondents had failed to prove.

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Sir *R. Palmer*, Q. C., and Mr. *Gainsford Bruce*,
 for the Respondents, were not called upon.

Judgment was delivered by

The Right Hon. Sir JAMES W. COLVILE.

The suit out of which this appeal arises was brought by the Respondents, or those whom they represent, to recover possession of the land in question from the principal Defendant, whose title to it is founded on a purchase of some property formerly belonging to a family of the name of *Mullick*, which was mortgaged to *Muttyloll Seal*, and sold under a decree of the late Supreme Court.


It is perfectly clear, and, indeed, it has been fairly admitted at the Bar, that one principal question, if not the only question tried in the Courts below, and on which both Courts have found in favour of the Respondents, was, whether the alluvial land, which is the subject of the suit, had been the subject of certain revenue proceedings under *Bengal Regulation II. of 1819* for the resumption and assessment of some alluvial land, in which a final decision was passed in the year 1833, or whether, on the other hand, they were part of certain *Lakhiraj* lands forming part of the mortgaged property, and which, having been the subject of other resumption proceedings, had been decreed to be *Lakhiraj* lands belonging to the *Mullicks*?

The principal question, therefore, which was tried, was a question of identity of parcels, and it is difficult to conceive a question which, having been very carefully tried and determined on the banks of the *Hoogly*, is less proper to be retried on the banks of the

Thames. That seems to have been the feeling of the learned Counsel for the Appellants, who have very candidly abandoned any attempt to shake the concurrent judgment of the Courts below upon that point. They have, however, raised a question whether, assuming the lands in question to have been properly found to have been part of those which were the subject of the resumption proceedings in 1833, the Respondents can be said to have established their title thereto, inasmuch as the settlement for the lands in question was improperly made by the Government with those whom the Respondents represent, whereas that settlement ought to have been made with the *Mullicks*.

The effect of the resumption proceedings in 1833 was this. The Government had claimed to resume and assess 117 *beegahs* of land; of those 117 *beegahs* of land it was found that 45 *beegahs* were, as contended by the *Mullicks*, who appeared on that proceeding, *Lakhiraj* land, part of their garden which had been washed away and reformed, and they accordingly released those lands. The remainder of the 117 *beegahs*, in round numbers 72 *beegahs*, were held to be subject to resumption and assessment of revenue, and it was directed that the revenue should be assessed upon them according to the Regulations.

That proceeding, it is admitted, was final as between all the parties to it. The usual proceedings were subsequently had. The revenue appears to have been assessed upon these lands in the ordinary way. The Appellants now contend, and it is substantially the only argument urged at their Lordships' Bar, that those 72 *beegahs*, and whatever land may have been added to it by subsequent accretion,

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is to be treated as an accretion upon their 45 *beegahs* of *Lakhiraj* land, and as land for which the Government was bound to settle with them and with no other person.

A question has been raised, by way of preliminary objection, whether such a case is open to them upon this record, and their Lordships having considered the pleadings, are clearly of opinion, that it is not. The principal issue is :—"Whether it is true, that the disputed land is included in the permanently settled *chur Ramkristopore* belonging to the Plaintiffs, was in their possession, and they were dispossessed of the same by the Defendant, *Muttyloll Seal* ; or that the said land, as part and parcel of the garden belonging to *Sreenath Mullick*, being according to the Order of the Supreme Court decreed and sold in auction, it was purchased by *Sreemutty Dossee*, and is in her possession ?"

Their Lordships, construing that issue as it stands, would certainly be disposed to hold, that it assumes that, whatever was included in the permanently settled *chur Ramkristopore* did belong to the Plaintiffs, and that the question was, whether the disputed lands were within that permanently settled *chur*, or whether it was to be treated as part and parcel of the garden which belonged to *Sreenath Mullick* ? But if there could be any reasonable doubt on the subject, their Lordships think that doubt is wholly removed, if the issue be construed and considered by the light of the principal Defendant's answer, in which we find this passage : "Specially when *Sreenath Mullick* was alive, with reference to the 133 *beegahs*, 2 *cottahs*, of *Lakhiraj chur*, appertaining to the said *Ramkristopore*, a suit for resumption was instituted by Govern-

ment, as Plaintiff; and it was at first decided in favour of Government, in the Collectorate of this *Zillah*. Afterwards, on appeal by the deceased *Mullick*, the claim of Government was dismissed, and his appeal decreed in the Court of the Special Commissioner. The disputed land is comprised within that." That is an assertion, that the land in dispute was not included in the subject of the revenue proceedings in 1833, but was the subject of the other revenue proceedings, which resulted in a decree in favour of the *Mullicks*, affirming the land claimed by them to be *Lakhiraj*.

But then the meaning of the issue is made still clearer by paragraph 6, which states that: "For the purpose of showing their rights, the Plaintiffs have alluded to the decision, No. 101 of the Special Commissioner's Court, and to that No. 279 of this Court; but those allusions are merely allusions. In fact, there is nothing said in those decisions, that they are with reference to the disputed lands." Therefore, there is, on the one hand, an affirmance that the land was the subject of other proceedings; and, on the other hand, a denial that they were the subject of the proceedings of 1833.

Their Lordships cannot but feel that it would be most mischievous to permit parties who had had their case upon one view of it fairly tried, to come before this Board, and to seek to have the appeal determined upon grounds which have never been considered, or taken, or tried in the Court below. It is obvious, that if they wished to make the case which they now make, they would, by their answer, have put the case in the alternative—viz., that assuming the land in question to have been the subject of those proceedings of 1833, the title which they now set up

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was a title under which they might fairly claim to hold. Whether that title could be substantiated, it is needless for their Lordships to consider, because they are clearly of opinion; that the question cannot be litigated upon this appeal, and, therefore, they abstain from doing so. They would only point out, that considering what was done in the first suit in the *Zillah* Court of the Twenty-four *Pergunnahs*, considering the lapse of time since the settlement was made, and considering what the revenue law, with respect to the claims of parties claiming to have a preferable right of settlement, may be, it appears to them that the Appellants would have very considerable difficulty in establishing their case. They do not feel that it would be right to make any special reservation, which would invite further litigation by the raising of such a case. It might have been raised in this suit, and has not been so. If having rested their defence on a false issue they are precluded by the decrees of the Courts below from hereafter raising the case now made, their Lordships do not feel that it would be right to open the door to them. If they are not so precluded, the dismissal of this appeal will not create a bar to them.

Upon the whole, their Lordships feel that the only Order which they can advise Her Majesty to make upon this record is, that the decrees of the High Court of *Calcutta* in the two appeals, Nos. 721 and 722, affirming the decree of the Principal *Sudder Ameen* of *Zillah* Twenty-four *Pergunnahs* be now affirmed, and this appeal dismissed with costs.

THOMAS ALEXANDER WISE *Appellant,*

AND

JUGGOBUNDHOO BOSE *Respondent.**

*On appeal from the Sudder Dewanny Adawlut, of
Bengal.*

THE suit out of which this appeal arose was brought by the Appellant, as personal representative of *William Wise*, late a Captain in the service of the East India Company, against the Respondent, to recover from the estate of *Kishen Koomar Bose*, deceased, his Father, the balance of principal moneys and interest at the rate of 12 *per cent. per annum*, secured under a *Tumasook* (Bond) which was granted by *Kishen Koomar Bose*. The Bond secured the repayment of Rs. 20,000, with interest, borrowed by, and paid to, *Kishen Koomar Bose*, by two cheques or drafts drawn by *William Wise*, in his own name, on his Bankers in *Calcutta*, and which were delivered through his Brother, *Josiah Patrick Wise*, the latter acting at the time as it appeared as the Agent of *William Wise*.

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor :—The Right Hon. Sir Lawrence Peel.

a relative of *A*, the consideration for which was also colorable, and made with a view to elude the Usury Laws.

Held, that the Bond, Lease and the Under-lease, formed one entire transaction, which was tainted with usury, and, therefore, void under *Ben. Reg. XV* of 1793, secs. 8 and 9.

23rd Feb.
1869.

Suit to recover principal and interest on a *Tumasook*, or Bond, dismissed under *Ben. Reg. XV*, 1793, sec. 9, on the ground of usury.

A granted a Bond to *B* to secure an advance of money. *C* acted as *B*'s Agent. A Lease was afterwards granted by *A* to *D*, a servant of *C*, at a colorable rent, and, subsequently, an Under-lease was made by *D* to *E*,

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The principal questions raised by the suit were, whether the moneys so lent to *Kishen Koomar Bose* were the moneys of *William Wise*, and whether the same were advanced through *J. P. Wise* acting as his agent; or whether the moneys belonged to the latter, and were advanced by him on his own account, as Principal, and not as Agent; and further, whether, if the moneys belonged to *William Wise*, and were lent through *J. P. Wise* as his Agent, the Appellant, as his personal representative, was entitled to recover the balance of principal money remaining due on the loan, either alone, or with legal interest thereon, notwithstanding the provisions of *Ben. Reg. XV. of 1793*, section 9, which was pleaded in bar to the suit by the Respondent.

The Appellant's case was, that the *Tumasook* was a genuine instrument, and not tainted by usury, and in no way connected with the Lease and Sub-lease.

It was insisted by the Respondent, that a Lease and a Sub-lease hereinafter mentioned, were made, and entered into by *J. P. Wise* and *Kishen Koomar Bose*, or another person on his behalf, as a device for providing for the payment of interest beyond the legal rate of 12 *per cent.* provided by the 9th section of the above Regulation. The Respondent maintained, that there was no privity between *William Wise* and the Appellant as his representative on the one part, and *Kishen Koomar Bose* and the Respondent on the other part, and that the *onus* of proving that *J. P. Wise* was the Agent of *William Wise* was on the Appellant, and that on that point he gave no proof whatever; that if any privity between Captain *Wise* and the Respondent, or his Father, had been

proved, still Captain *Wise* was bound to adopt the transaction in its entirety. That he could not adopt the Bond without adopting the Lease and Sub-lease, and the attendant transactions; that such transaction was usurious and an attempt to evade the Usury laws, and that the Bond and the Lease and Sub-lease were void, so that no other decree but that of dismissal could have been under the above Regulation made in the suit.

The following is the history of the transactions out of which the suit arose:—

In the year 1831, the Respondent's Father, *Kishen Koomar Bose* applied to *Josiah Patrick Wise* for a loan of S. Rs. 20,000, to be paid off in six years. *J. P. Wise* was a British subject, and a Brother of the Appellant, and of the late Captain *William Wise*. He was at that time carrying on business at *Dacca* as a Merchant. After some negotiation a loan of S. Rs. 20,000, bearing interest at 36 *per cent. per annum*, or 3 *per cent. per mensem*, was arranged between *Kishen Koomar Bose* and *J. P. Wise*.

The Statute, 13th *Geo. III. c. 63*, sec. 30, was in force when this transaction was entered into. It prohibited British subjects in the *East Indies* from taking directly or indirectly interest above 12 *per cent. per annum*, and it declared all Bonds and contracts whatsoever for payment of principal, or for any usury, above 12 *per cent. per annum* utterly void.

The material sections of *Ben. Reg. XV. of 1793* which affected this case were to the following effect:—

IV. If the cause of action should have arisen on or after the 1st of *January, 1793*, the Courts are not to decree any interest on any sum whatsoever above the rate of 12 *per cent. per annum*.

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V. If a lower rate of interest should have been stipulated no higher rate than the rate so stipulated was to be decreed.

VI. No accumulations of interest beyond the amount of the principal.

VII. And no compound interest were to be decreed.

VIII. The Courts are not to decree any interest whatsoever in any case where the Bond or instrument given for the security and evidence of the debt shall have been granted on or subsequent to the 28th of *March*, 1780, and should specify a higher rate of interest than is authorized by the Regulation to have been given and received subsequent to that date.

IX. Nor to decree any interest whatsoever in favour of the Plaintiff, in any case where the cause of action shall have arisen on or subsequent to the 28th of *March*, 1780, where a greater interest than is authorized by the Regulation shall have been received, or stipulated to be received, if it be proved, that any attempt has been made to elude to the rules prescribed in the Regulation by any deduction from the loan, or by any device or means whatsoever, "nor to give any other judgment but for the dismissal of the suit, with costs to be paid by the Plaintiff."

It appeared, that to take the case out of the Usury laws, and yet obtain interest, at a rate exceeding 12 *per cent. per annum*, it was arranged that *Kishen Koomar Bose* should give a *Tumasook* (Bengallee Bond) for payment to *J. P. Wise* of the Rs. 20,000 with interest, on the face of it at one *per cent. per mensem*, within six years, that *Kishen Koomar Bose* should give an *Izarah* or Lease of certain estates to a Servant of *J. P. Wise*, named *Moneeram Sircar*, and

that afterwards the property should be Under-leased to *Kishen Koomar Bose* in the name of his relative, *Subchunder Ghose*, and that the interest in excess of one *per cent. per mensem* should be taken from the allowance called *Rupoom*, of the Lease and the profits of the Under-lease.

Accordingly, in *June*, 1831, S. Rs. 20,000, were advanced by *J. P. Wise* to *Kishen Koomar Bose*, and the latter then delivered to him the *Tumasook*, by which he agreed to pay *J. P. Wise* S. Rs. 20,000, with interest at one *per cent. per mensem* by the month of *Chey*t, 1243, or *March*, 1837. At the same time *Kishen Koomar Bose* also signed an *Izarah* or Lease of his interest in certain *zemindaries* to *Moneeram Sircar* for a term of six years from 1238, (or *April*, 1831,) to 1243. This document was not in the record, but *Moneeram Sircar* executed and delivered to *Kishen Koomar Bose* an *Izarah Kabooleat* or counter-part Lease, which was in evidence. In this document the collections from the *zemindaries* were stated to amount to S. Rs. 14,933. 11. 2. 0; the expenses of collection to S. Rs. 1,160. 13. 10. 2; the fees of the Lease S. Rs. 1,200; the proprietor's expenses of collecting the wages of legal Agents, and expenses incidental to the payment of the Government assessment S. Rs. 300; the Government assessment S. Rs. 6,117. 9. 5. 0. The balance, amounting to S. Rs. 6,155. 4. 5. 0, was reserved as the annual rent which *Moneeram Sircar* agreed to pay *Kishen Koomar Bose* during the term of six years by certain specified monthly instalments. By a memorandum endorsed on the counter-part Lease signed by *J. P. Wise*, he became bound as surety for *Moneeram Sircar*.

Kishen Koomar Bose at the same time delivered to

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Moneeram Sircar a *Borratnamah*, by which he directed *Moneeram Sircar* to pay *J. P. Wise*, during the term of six years, the sum due to him for allowance, and to take upon himself to pay off the Bond debt, which, with interest at one *per cent. per mensem*, would amount to S. Rs. 27,438. 2 a. 3 g. 2 c. from the net rent for the property, during the whole term.

Moneeram Sircar was thereupon let into possession of the property, and collected the rents from *Bysack*, 1238, corresponding with the middle of *April*, 1831, a little more than a month anterior to the loan, and he continued in possession and collected rents for about nine months.

On the 15th of *January*, 1832, *Moneeram Sircar* executed an *Izarah* or Under-lease of the property leased to him to a relative of *Kishen Koomar Bose*, named *Subchunder Ghose*, for the identical term of the Lease commencing from the year 1238, at a profit of Rs. 850 a year, which sum was reserved to be paid to *Moneeram Sircar* annually during the whole term, according to the instalments at foot. *Kishen Koomar Bose* also bound himself to *Moneeram Sircar* as security for *Subchunder Ghose* in respect of the Sub-lease, and took possession of the *semin-daries*.

According to this arrangement, *J. P. Wise* became entitled to receive during the six years the amount of net rent reserved in the Sub-lease at Rs. 7,150 *per annum*, of which Rs. 5,100 was specifically appropriated to the principal and interest at 1 *per cent.*, under the assignment, Rs., 42,900; the *Rupoom Izarah-daree*, or fees for Lease, which was at first fixed at Rs. 1,200, and afterwards by the Sub-lease at Rs. 1,035; 6,210, amounting in the whole to S. Rs. 49,110, whereas

the amount of the Bond with legal interest, if paid at the end of the term, only amounted to S. Rs. 21,672.

Kishen Koomar Bose having fallen into arrears in the payment of his rent, *Moneeram Sircar*, on the 25th of *April*, 1834, instituted a suit in the Court of the Principal *Sudder Ameen* of *Zilla Dacca*, to recover from *Subchunder Ghose*, as Sub-lessee, and from *Kishen Koomar Bose*, as his surety, S. Rs. 14,969, 12. 2 which was made up as follows: Rent at Rs. 7,150 *per annum* from *Bysack* 1238, to *Maugh*, 1240, being 2 years and 10 months, according to the instalments of the Sub-lease, S. Rs. 19,675, less paid on account, 6,510. 13. 18. 1. Interest from *Maugh*, 1238, to *Maugh*, 1240, at 1 *per cent. per mensem*, Rs. 1805. 10. 1; making together Rs. 14,969. 12. 2.

Kishen Koomar Bose by his answer, after stating at length the particulars of the transaction, contended, that the Sub-lease in question was part of the loan transaction between *J. P. Wise* and himself, that it was a device to elude the Usury laws, and that under sec. 9, of *Ben. Reg. XV.* of 1793, the suit ought to be dismissed.

Shortly afterwards, and on the 29th of *May*, 1835, *Moneeram Sircar*, on the ostensible ground that he could not pay the expenses of litigation, assigned the Lease, and the suit for recovery of the rent and his rights under the counterpart Lease, to *J. P. Wise*, and by a proceeding, dated the 12th of *June*, 1835, founded on a petition by *J. P. Wise*, his name was substituted as the Plaintiff, in the suit, in lieu of that of *Moneeram Sircar*.

J. P. Wise as the substituted Plaintiff, filed a rejoinder to the effect, that *Moneeram Sircar* had been the actual Lessee, that though the rent had been

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made applicable to the liquidation of the Bond, it was in fact a separate transaction, that the Sub-lease was also a distinct transaction, and denied that the Sub-lease was a cloak to screen a usurious transaction; and submitting that, as he then stood in *Moneeram Sircar's* place, he was entitled to recover.

The suit came on for hearing before Mr. *John Cooke*, acting Judge, who found that the Bond, Lease and Sub-lease formed, in effect, one and the same transaction between *J. P. Wise* and *Kishen Koomar Bose*, and that *Moneeram Sircar* and *Subchunder Ghose* were mere tools; that the transaction was usurious, and he ordered, that the suit should be dismissed, with costs, under the provisions of sec. 9, *Ben. Reg.* XV of 1793.

J. P. Wise appealed to the *Sudder Court* against this decree, and after a separate consideration of the case by four Judges, consisting of Messrs. *Edward Lee Warner*, *David Smith*, *Thomas P. B. Bonell Biscoe*, and *Charles Tucker*, that Court, the fifth Judge (*A. Dick*) presiding, on the 8th of *September*, 1840, ordered that the appeal of *J. P. Wise* should be dismissed, and the decree affirmed with costs.

J. P. Wise appealed to Her Majesty in Council, but, the appeal was dismissed, and the decision of the *Sudder Court* affirmed (a).

On the 8th of *April*, 1849, the Appellant, claiming as the administrator of the estate of Captain *Wise*, instituted a suit in the Court of the Principal *Sudder Ameen* of *Dacca* against the Respondent, as the administrator of *Kishen Koomar Bose*, who had died, and *J. P. Wise*. The plaint stated, that Captain *Wise* wishing to return

(a) See case reported 4 Moore's Ind. App. Cases, 201.

to *England*, authorized *J. P. Wise*, if any respectable person wished to take a loan of money at one *per cent. per mensem*, to make a loan out of his funds; that *Kishen Koomar Bose* applied to *J. P. Wise* for a loan of Rs. 20,000, bearing interest at one *per cent. per mensem*, that *J. P. Wise* agreed to make such loan, and lent that sum to *Kishen Koomar Bose*, who, on the 17th *Jeyt*, 1238, on his *Tumasook* agreed to pay the same with interest at one *per cent. per mensem*, in *Chey*t, 1243. That the advance was out of the moneys of Captain *Wise*, and that for the repayment of the sum lent, *Kishen Koomar Bose* gave an *Izarah* to *Moneeram Sircar* and an order was made for payment of the advance and interest out of the rents. That the Lessee took possession, and nine months afterwards *Kishen Koomar Bose* took from *Moneeram Sircar*, an Under-lease of the same estate in the name of his Agent, *Subchunder Ghose*, on his own security; that *Kishen Koomar Bose* did not pay the rent, that *Moneeram Sircar* sued for the rents due, and while the suit was pending, he transferred all his benefit under the *Izarah* to *J. P. Wise*. That such suit was unsuccessful, that of the fact of the *Izarah* and due *Izarah* Captain *Wise* knew nothing. That the decision in the rent suit could be no bar to his proceeding in the suit, as neither were the parties to nor was the subject matter of the two suits identical. That Captain *Wise* died in *November*, 1847, leaving two Brothers, the Appellant and *J. P. Wise* his heirs. That the Appellant alone obtained from the Supreme Court probate of his Will, and that he had, therefore, the right to collect the money. That Rs. 1,966. 9. 14. 3, for principal, and Rs. 4,544. 4. 3. 2, for interest, making together Rs. 6,510. 13. 13. 1, had been paid, leaving a balance of Rs. 18,033. 6. 3. 1, for

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principal, and that as the amount due for interest had accumulated to a sum equal to the principal he sued to recover, Rs. 36,066. 12. 10. 2, equivalent to Rs. 38,47. 1. 3. 15, from the Respondent, who on his Father's death became liable to pay the same out of his property.

The Respondent by his answer pleaded, in effect, that his Father was never indebted to Captain *Wise*, and that Captain *Wise* had never made any claim, and that the moneys advanced were not his; that, on the contrary, *J. P. Wise* had made the advance out of his own funds and by means of the *Izarah* had made a usurious bargain, and that he had attempted to evade the Usury laws and received usurious interest; and that the claim ought to be dismissed under section 9 of *Ben. Reg. XV.* of 1793; and he submitted, first, that the claim had already by the several decisions in the former suit been pronounced inadmissible, and secondly, that the suit was a fraud concocted between the Appellant and *J. P. Wise* to get rid of the former adjudication.

The issues in the suit were, first, was Captain *Wise* or Mr. *J. P. Wise* the owner of the money lent? Secondly, was the Plaintiff authorized to sue for the money? And thirdly, had *Juggobundhoo Bose* repaid the money? A further issue in bar to the suit was, whether or not, the former suit decided on the 1st of *June*, 1837, by the Judge of *Dacca*, and appealed to the *Sudder Court* and to the Privy Council, rendered the last suit liable to dismissal under sec. 16, of *Reg. III.* of 1793, without going into the merits.

On the 29th of *November*, 1851, the suit came on for hearing upon these issues, when Mr. *H. V. Bayley*, and the then additional Judge of *Dacca*

held, that the matter had already been adjudicated by the decrees in the former suit, and dismissed the claim with costs.

Against this judgment the Appellant appealed to the *Sudder* Court. The appeal was heard on the 26th of *June*, 1852; and that Court (Mr. *C. Steer* presiding), considered that the additional Judge was in error in ruling that the suit was barred from even a hearing by section 16, of *Ben. Reg. III.*, of 1793, as in his opinion it was a "*de novo* action to be decided on its merits, although all due weight should be given to the intent and effect of the final decree of the Privy Council on the rent claim," and he ordered the decision of the additional Judge to be reversed, and the case remanded for a hearing and judgment on its merits.

On the 22nd of *September*, 1854, the additional Judge of *Dacca* fixed the following issues in bar:—First, did the decision of the *Sudder* Court of the 8th of *September*, 1840, bar the suit? and, secondly, did the decision of Her Majesty's Privy Council of the 12th of *February*, 1847, bar the suit? and certain issues on the merits, together with a supplementary issue whether cl. 4, sec. 4, *Reg. XXVI.* of 1814, and sec. 9, of *Ben. Reg. XV.* of 1793 admitted of any decree but the dismissal of the suit?

The Appellant, to support his claim, examined witnesses and produced some documents, the greater part of which were not proved. He was not himself examined as a witness, nor did he take any steps to procure the evidence of *J. P. Wise* to prove that he had acted in the transaction as Agent for Captain *Wise*, and show by Letters and accounts what was the extent and nature of his authority.

On the 30th of *June*, 1854, judgment was

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pronounced by Mr. *H. V. Bayley*, the additional Judge of *Dacca*. The effect of his judgment was, that the first and second issues had been already disposed by the *Sudder* Court, when it remanded the case, as a *de novo* action, to be decided on the merits, although all due weight was to be given to the intent and effect of the final decree of the Privy Council on the rent claim. On the eighth issue, looking at the substance of the transaction, he considered that the Bond was one of three instruments executed as mere shifts for usury, and to elude the Usury laws; that there was no proof that Captain *Wise* was the lender; that the substance of the contract showed, that the lender of the money under the Bond was *J. P. Wise*, whether *J. P. Wise* drew the money from Captain *Wise* or not; and that the suit admitted of no other judgment but dismissal under section 9 of *Ben. Reg. XV.* of 1793. That even if Captain *Wise* had been the lender, yet, the attempt to elude the usury law being proved, the contract was his, and this suit on the Bond would have been repudiated by the Court; and he ordered the suit to be dismissed with costs.

Against this decree the Appellant appealed to the late *Sudder Dewanny* Court at *Calcutta*. While such appeal was pending, proceedings were taken to obtain security for the costs of the appeal, in consequence of the Appellant having proceeded to England. The *Sudder* Court, in consequence of no security being deposited within six weeks, dismissed the appeal by an Order dated 21st of *August*, 1855. The Appellant applied unsuccessfully to obtain a review of this Order. He then appealed to Her Majesty in Council against the Order dismissing his appeal. By an Order in Council, dated the 29th of *July*, 1859, the

Order of the *Sudder* Court, dated the 21st of *August*, 1855, was reversed, and his appeal against the decision of the additional Judge of *Dacca* was restored (a).

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On the 7th of *April*, 1862, the appeal came on for hearing before Messrs. *C. B. Trevor*, *H. V. Bayley*, and *C. Steer*, three of the Judges of the *Sudder* Court. The material portion of their judgment was as follows : —“That the Bond executed by *Kishen Koomar Bose* was in *J. P. Wise*'s favour, and that the whole transaction was ostensibly carried on by that person is equally clear. The allegations then in the present plaint are, interpreting it in the only way that will give the Plaintiff a right to sue the Defendant, not only that the money was Captain *Wise*'s, for that alone would, as before remarked, give Captain *Wise* no right to sue the Defendant, but that *J. P. Wise* was the Agent of Captain *Wise*, that is, the Agent of an undisclosed Principal, and that he, *J. P. Wise*, entered, either in his own name or that of others, into certain transactions as to the Lease and Sub-lease with the Defendant's Father, beyond the authority vested in him; that he, Captain *Wise*, the Principal, is at liberty to repudiate these unworthy transactions, and to sue a third party for so much of the transaction as was done by his Agent, *J. P. Wise*, within the authority conferred upon him. As the Defendant denies the agency or privity of any sort with the Plaintiff, it is necessary first to enquire, what is the evidence of the alleged agency of *J. P. Wise* for Captain *Wise*. It appears from an office copy of an account between Messrs. *Mackintosh & Wise*, and

(a) See case reported on this point 7 Moore's Ind. App. Cases, 431.

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other evidence before us, that the two cheques of Rs. 10,000 each, were drawn on the firm of *Mackintosh & Co.* by Captain *Wise*, in favour of *J. P. Wise*, on the 24th of *May*, 1831, and were debtor to the former in the account of the firm severally on the 21st of *June*, 1831, and the 6th of *July*, 1832, that with these cheques *J. P. Wise* purchased *hoondies* on *Calcutta* and sold them in the *Dacca Bazaar*, and from the proceeds made the payment to *Kishen Koomar Bose*. Now, admitting this evidence as true, it only goes to prove, that *J. P. Wise* borrowed the money from his Brother, Captain *Wise*. It does not show that *J. P. Wise* acted in this transaction as the Agent, either by express or implied authority, of his Brother, or that, in short, the relation of Agent and Principal, as regards the Rs. 20,000, existed between them, and on failure of proof on this point the plea of the Defendant, confined to the state of the Bond itself, stands good. It follows, that the present action, which in order to be successful must be founded on proved agency, either expressed or implied, necessarily fails. But, even admitting the agency, we would remark, though the point is not necessary to our decision of the case, that whilst, as Principal, Captain *Wise* is entitled to all the advantages and benefits of the contract of his Agent, considered in its entirety, he must take them with all the attendant trade transactions, and subject to all the attendant just counter-claims and defences of the other contracting party; and if the contract entered into by *J. P. Wise* was impeachable for a fraudulent attempt to evade the Usury laws, Captain *Wise*, as a general rule, would be affected with all the consequences thereof, and could not avail himself of his own

innocence arising from ignorance, to support what would otherwise be a defective title. It follows, from the view which we adopted before, that the present suit, founded on the agency of *J. P. Wise*, necessarily fails. The decision of the lower Court is affirmed, with costs."

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The Appellant, dissatisfied with the decree founded on this judgment, brought the present appeal.

Sir *R. Palmer*, Q.C., and Mr *Leith*, for the Appellant.

Neither *William Wise* nor the Appellant, his personal representative, was made a party to the former suit (*a*), to enforce the terms and conditions of the under-lease, which was rightly treated by the Plaintiff in that suit as made long subsequent to and entirely distinct and separate from the transaction of the loan; that decision is not *res judicata* and is in nowise binding on, and ought not to be used in the present suit to affect prejudicially the rights and interests of *William Wise*, or his estate. We submit, that the *Tumasook* is *primâ facie* valid, and, therefore, the *onus* of proving that the subsequent transactions were a shift to evade the law respecting usury lay on the Defendant, and that he failed to prove that the original loan was usurious. No subsequent reservation of illegal interest will taint or invalidate the original claim. There was no evidence of any agreement by *J. P. Wise* at the time of the execution of the *Tumasook*, or of effecting the loan, that the Sub-lease should be thereafter executed as part of the original transaction, or to secure the payment of more than

(a) See *Wise v Kishen Koomar Bose*, 4 Moore's Ind. App. Cases, 201.

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legal interest on the loan, or that *William Wise* ever received any usurious interest in respect to the loan, or that any profit was derived by the Lessee which could be applied to the payment of interest in excess of legal interest. The *Ben. Reg. XV. of 1793, sec. 9*, upon which the Court below founds its judgment, contains no declaration that the principal money should be forfeited, nor that the original contract of loan or the Bond to secure the repayment is null and void, even if such a device as therein mentioned should be proved. Such enactment being a penal one, cannot be extended by mere implication to affect such forfeiture.

Mr. *Cave*, for the Respondent, was not called on to address their Lordships.

Judgment was delivered by

The Right Hon. the Lord Justice GIFFARD.

Their Lordships are unable to entertain any doubt upon this case, either with respect to the facts, or with respect to the law which is applicable to those facts.

The facts are simple and plain. It is perfectly clear, that the original Lease was connected with the Bond, and that that Lease was a beneficial Lease. But the matter does not stop here, because, when you come to the under-lease, although it was subsequent in point of date, it has reference back to the date of the original Lease; and if you look at the assignment from the Servant at the time when the Servant ceased to be in the service of Mr. *J. P. Wise*, that assignment deals with the whole as one entire transaction. Their Lordships, therefore, can come

to no other conclusion than that the transaction was one entire transaction, and that it was a transaction which was tainted with usury.

Then, with respect to the argument, that Captain *Wise* had no knowledge of what took place, it appears, that to all intents and purposes, Mr. *J. P. Wise* was his Agent. It is not alleged, and still less is it proved, that the Native who lent his money was at all aware, that there was any distinction between one part of the transaction and the other. In point of fact, Mr. *J. P. Wise* was acting for an undisclosed Principal, the loan being a lending upon one transaction, which transaction was clearly usurious; therefore, Captain *Wise* is in this position: either he must go against his Agent and repudiate the transaction altogether, or if he does not repudiate the transaction, he must take it with all its consequences.

That being so, brings us to the terms of Regulation XV. of 1793. There are two sections affecting the question, the 8th and the 9th. The 8th section deals with the case in which the usurious interest is disclosed on the face of the instrument, and is different to the 9th section. There might be a very good reason for that. There might well be, where there was no fraud, and where the whole thing was disclosed, a right to recover the principal, whereas, in a case where there was fraud, that right might be taken away. The terms of the 9th section appear to their Lordships to be perfectly clear, because the Court is not "to decree any interest whatsoever in favour of the Plaintiff, in any case where the cause of action shall have arisen on or subsequent to the 28th of *March*, 1780, where a greater interest than is authorized by this Regulation

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shall have been received, or stipulated to be received, if it be proved, that any attempt has been made to elude the rules prescribed in it by any deduction from the loan, or by any device or means whatever;" and then there comes this: "nor to give any other judgment but for the dismissal of the suit," and we cannot conceive that that means anything but the dismissal of the suit, so far as it has relation to that usurious contract, though of course it would be different, if there was one count on one transaction, and another count upon another and a totally different transaction; in point of fact this matter, if not actually concluded by the judgment, is virtually concluded by the expression of opinion in the former case of *Wise v. Kishen Koomar Bose*, for in 4 Moore's Ind. App. Cases, 219, we find this sentence: "If, therefore, in this case, we were to pronounce a judgment whereby the principal should be recovered, without interest, such a judgment would be in complete defiance of that Regulation, by which we are bound." We have nothing to do but to repeat these words, in which we fully concur; therefore, on both grounds, first, because the transaction was usurious, and, second, because of the terms of the Regulation, their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed with costs, and the decree appealed from affirmed (a).

(a) See *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, ante, p. 157.

KATCHEKALEYANA RUNGAPPA KA-
LAKKA TOLA OODIAR ... } *Appellant.*

AND

KACHIVIJAYA RUNGAPPA KALAKKA
TOLA OODIAR ... } *Respondent.**

*On appeal from the High Court of Judicature at
Madras.*

THIS was an appeal by the *Zemindar* of *Oodiar Poliem*, from a decree of the High Court of *Madras*, rejecting a regular appeal from a decree of the Civil Court of *Trichinopoly*. The question being, whether the Civil Court's decree awarding to the Respondent maintenance, marriage expenses, and residence out of the proceeds of the *zemindary* of *Oodiar Poliem* was correct.

The circumstances out of which this question arose were these :—

° Present:—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Primary Judge. Held (1) that such omission was not fatal, as the Court could proceed to decision in the manner indicated by section 351 of the Code; and (2) as the Court had directed an inquiry as to maintenance, which was to be deemed equivalent to issues.

It is in the discretion of the Judge in a maintenance suit, in estimating the amount to be awarded, to fix the place of residence.

The Letters Patent of 1862, creating the High Court of Judicature at *Madras*, section 42, provide, that the reasons given by the Judges of their decision should, on appeal to *England*, be transmitted with the record for the information at the hearing by the Judicial Committee of the Privy Council, which direction it is the bounden duty of the Judges to comply with.

24th Feb.
1869.

In a suit against a *Zemindar* by a member of his family for maintenance out of the *zemindary*, no issues as directed by the Code of Civil Procedure (Act, No. VIII. of 1859, secs. 139-141) were recorded by the

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By an *Istimrar Sunnud*, dated the 23rd of December, 1817, the *zemindary* of *Oodiar Poliem* was granted to *Katchi Rungappa Oodiar*, the Father of the Appellant and Respondent, as his self acquisition. *Katchi Rungappa Oodiar*, the first *Zemindar*, died before the year 1834, leaving *Moottoo Vizia*, his eldest Son and heir surviving, who became the second *Zemindar*. *Moottoo Vizia* died in 1836, leaving *Katchi Rungappa*, an infant Son and heir, surviving, who became the third *Zemindar*. He died in the same year, leaving his Uncle, the Appellant, the heir to the *zemindary*.

On the 13th of December, 1860, the Respondent filed a plaint in the Principal *Sudder Ameen's* Court at *Trichinopoly*, against the Appellant, to recover Rs. 9,999 for his maintenance, accomodation, and marriage expenses. The plaint stated, that the Plaintiff was the third and the Defendant the first of the three Sons of Plaintiff's Father, then living; that the Defendant was in possession of real and personal property of the Plaintiff's Father, namely, the *zemindary* of *Oodiar Poliem*, capable of yielding an annual income of Rs. 40,000; Jewels, and ready cash received by the Defendant from the *Circar* at the time of his installation valued at Rs. 61,393. 3a. 3p., and two villages, situate in the *Zillah* of *Combaconum*, capable of yielding Rs. 1,000 a year; that the Plaintiff was entitled to one-third of the income, both under Hindoo Law and local usage, and prayed, first, a decree for an annual sum of Rs. 3,000, or Rs. 250 *per mensem* for his maintenance; and secondly, that the Building known by the name of *Niddaraihoodum*, lately occupied by his Mother, and situate at *Oodiar Poliem*, and valued at Rs. 3,000, might be made

over to him ; or, in the alternative, to pay him Rs. 2,997 for erecting a House for his residence ; and a further sum of Rs. 4,000 for the expenses of his marriage.

The Appellant by his plea stated, first, that more than twelve years having elapsed since the Plaintiff's maturity, his claim was barred by the Statute of Limitation. Secondly, that the income from the *zemindary* was not sufficient to cover his expenses. Thirdly, that the Plaintiff's Mother was in the receipt of a monthly maintenance of Rs. 40, under a decree of the Court, and that the Plaintiff being a member of her family, was not entitled a separate maintenance. Fourthly, that Rs. 7 a month was sufficient for a man to support himself on. Fifthly, that the Defendant was not bound to pay for the expenses of the Plaintiff's marriage, nor to erect a building for his residence.

Two documents were given in evidence by the Plaintiff, exhibits A and B. The first (A.) was a decree of the *Sudder* Court, dated the 23rd of *December*, 1837, in a former suit for maintenance out of the same *zemindary*, which was dismissed on the ground, that the *zemindary* was the self acquisition of the *Zemindar*, the Defendant, under the before-mentioned *Istimrar Sunnud*, dated the 23rd of *December*, 1817, but that the then Plaintiff, *Katchi Oodiar*, who claimed through an illegitimate Son, and the *Zemindar* under the *Istimrar Sunnud*, being Grandsons of a former *Zemindar*, the Plaintiff, whether legitimate or not, would (the family being *Soodras*) have otherwise been entitled to maintenance. The second (B.) was a petition by the Appellant, dated the 18th *August*, 1836, praying either for possession of the *zemindary* as heir, or for maintenance

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at Rs. 700 a month, stating that "the aforesaid *zemindary* and my *kavil* (*moniam*) lands, situate in the *Arcot Suba*, yield an income of Rs. 50,000 a year." No other evidence was then adduced.

The Principal *Sudder Ameen* by his decree dismissed the plaint on the ground that the *zemindary* was self-acquired.

The Respondent appealed to the Civil Court of *Trichinopoly*, urging that the *zemindary* was ancestral property, and not the self-acquired estate of the Appellant; that by the deed of permanent assessment with the late *Zemindar*, Father of both the parties, the *zemindary* was vested in him, his heirs, successors, and transferees; that the Government, on the death of the late *Zemindar*, allowed the property to pass to the Appellant, after receiving from the latter a *muchilka* (agreement) to the effect, that he should maintain the Respondent, at the time an infant, and the other members of the family; that evidence of the Respondent had been rejected; and lastly, that the Appellant and the other members of the family had been in receipt of maintenance from the *zemindary*.

The Civil Court by its decree affirmed the decree of the Principal *Sudder Ameen* on the like grounds.

In the special appeal preferred by the Respondent, the High Court by its decree, dated the 19th of *December*, 1862, overruled both the decrees of the Principal *Sudder Ameen* and the Civil Court, declaring that the *zemindary* was ancestral, and the Respondent entitled to maintenance from it, and the suit was remanded to the Civil Court with instructions "To ascertain the means of the Appellant and the other facts of the case, and to proceed to a decision in the manner indicated in section 351 of the Code of Civil Procedure."

The suit was accordingly remanded to the Civil Court of *Trichinopoly*, and heard as an original suit, without any further proceedings being taken in the subordinate Court of the Principal *Sudder Ameen*.

No issues were framed in the Civil Court.

Evidence was given by the Respondent of a petition, filed in the year 1817 by the then *Zemindar* for maintenance to his Son, and Orders by the Collectors awarding maintenance to members of the family. The Appellant was not permitted to give any evidence, the Court considering it unnecessary to examine any witnesses, although, as the Appellant alleged, among the documents which he might have produced, if he had not been prevented by the absence of issues, and by the decision of the Civil Judge, was a *Sunnud* of the Collector, dated the 20th of *June*, 1849, showing that the income of the *zemindary* was then reduced by the income of the *Kavil* lands, amounting to more than Rs. 26,000 per annum.

On the 29th of *October*, 1863, the Civil Judge (Mr. *T. J. P. Harris*) made his decree which stated, that the Defendant urged, that Rs. 35 a month were sufficient for the support of the Respondent; that the Defendant admitted the exhibit B, and as the *zemindary* yielded annually Rs. 50,000, the Appellant was in a position to allow the Respondent a proper maintenance; that document D, showed that Rs. 250 were formerly awarded to a member of the family as maintenance; therefore, the Court directed the Defendant to pay the Plaintiff monthly, Rs 200 as maintenance, together with arrears from the date of plaint, and Rs. 2,000 for marriage expenses, and part of the Defendant's House to be given up as a place of residence for the Plaintiff, and to pay the costs.

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From this decree the Appellant filed a memorandum of appeal on the following among other grounds:— first, that the claim was barred by the Statute of Limitation; second, that the *Istimrar Sunnud* granted to the first *Zemindar* was not produced to show the nature of the property; third, that the Respondent's Mother was entitled to be maintained by her Son, and the Appellant ought to be relieved, at least, to the extent of her maintenance. Fourth, that the Civil Judge's estimate of the income of the *zemindary* was erroneous. Fifth, that the Civil Court had not correctly estimated the wants of the Respondent. Sixth, that it had misconstrued the document B. Seventh, that documents D and E, which were Orders from the Collector in reply to claims made by the Respondent's elder Brother for maintenance and for housing, were not evidence against the Defendant, nor was there any evidence of their having been acted upon. Eighth, that the maintenance awarded being more than liberal, no separate allowance was necessary for the marriage of the Respondent, and, even if necessary, the amount awarded was exorbitant; and ninth, that after allowing maintenance, the Appellant was not bound to provide the Respondent with lodging, and to allow him to live in the Palace would be inconvenient both in principle and practice.

On the 28th of *May*, 1864, a decree was passed by the High Court of *Madras*, consisting of Mr. Justice *Phillips* and Mr. Justice *Frere*, dismissing the appeal, on the ground, that it was of the nature of a special appeal. No grounds were given for the decree, nor were the reasons of the Judges for their judgment transmitted to *England* with the record.

The appeal was from this decree.

As the Respondent did not appear, the appeal was heard *ex parte*.

Sir *R. Palmer*, Q.C., and Mr. *Mackeson*, Q.C.,
for the Appellant.

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In the first place, the proceedings in the Civil Court were wholly irregular. No issues or points were framed or recorded as directed and required by the Code of Civil Procedure (Act. No. VIII. of 1859), secs. 139, 140-1. That is a fatal objection; *Srimut Moottoo Vijaya Gowery Vallabha Perria Woodea Taver* v. *Rany Anga Natchiar* (a), *Baboo Rewun Pershad* v. *Jankee Pershad* (b). Secondly, evidence was improperly rejected. The Appellant was debarred from calling witnesses, or giving in evidence a *Sunnud* of the Collector which would have shown the real income of the *zemindary*, the very point in issue. That was a denial of justice, and the suit ought, therefore, to be remitted to *India*, since no satisfactory decision can be arrived at on the merits: *Jeswunt Sing-jee Ubby Sing-jee* v. *Jet Sing-jee Ubby Sing-jee* (c). Thirdly, no maintenance can be awarded out of a *zemindary*, but even if it could be by the Hindoo Law, the amount of such maintenance out of an indivisible family property must depend on a properly ascertained amount of the net income: *Exp. Janaky Ummah* (d). Here maintenance was awarded on an assumption, that the net income of the *zemindary* was

(a) 3 Moore's Ind. App. Cases, 278.

(b) 10 Moore's Ind. App. Cases, 25.

(c) 2 Moore's Ind. App. Cases, 424.

(d) 2 Strange's Mad. Cases, 285, and see note to *ib.*, p. 288.

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above Rs. 50,000 *per annum*. The plaint only assessed it at Rs. 40,000, but after paying taxes, interest, and instalments of family debts, and other necessary expenses, it was shown that such annual income did not exceed Rs. 2,000. Lastly, no separate allowance ought to have been made for the Respondent's marriage, for the Appellant was not bound to provide the Respondent with a residence in addition to maintenance.

Judgment was delivered by

The Right Hon. the Lord Justice SELWYN.

Their Lordships have considered this case, and they must in the first place express their regret, that the record contains no statement of the grounds of the decision of the High Court which is now under appeal. The Charter of the High Court of Judicature, section 42, expressly requires, that the reasons of their decisions should be recorded by the Judges, and transmitted for the information of this Court, and it is the subject of great regret, especially in a case which comes before their Lordships *ex parte*, that the grounds of the judgment appealed from should be wanting in the record. But in the absence of any such information, their Lordships must deal with the case as it appears on the record in this present suit.

The first objection which is taken is, that in this case no issues were directed in the manner which has been prescribed by the practice of the Courts in *India*. But the decree of the 19th of *December*, 1862, which directs that the matter shall be referred to ascertain the amount of maintenance, which may appear to be justly and properly payable with reference to the means of the Defendant, and the other facts of the

case, and to proceed to the decision in the manner indicated in section 351 of the Code of Civil Procedure, removes any such objection, because, that is, in substance, an Order for inquiry, and an Order for inquiry raising the very points upon which the Appellant has relied in the arguments before this Court; for it is a direction to ascertain the amount of the maintenance which may appear to be justly and properly payable with reference to the very point which it was urged ought to have been taken into consideration, viz. the means of the Defendant, in connection with the other facts of the case. It appears to their Lordships to be impossible to object to such an inquiry as that, upon the ground of its not being sufficient. It is, therefore, equivalent to issues, and rendered any further issues entirely unnecessary. The first ground of objection, therefore, fails.

We proceed, then, to the second ground, namely, that there was in this case an improper rejection of evidence. Now, it appears to their Lordships that, under an inquiry such as that to which I have alluded, it was obviously competent to either party to produce evidence in support of his case during the conduct of that inquiry; and if evidence had been properly tendered on the part of the Appellant, and had been improperly rejected by the Judge, such improper rejection of evidence would have constituted a valid ground for appeal. But we find that, in fact, there was an appeal from the decision of the Judge,—a decision arrived at in the prosecution of that inquiry,—and the eleven grounds for the appeal from that judgment are stated. In considering these eleven grounds, we find, in the first place, that the Appellant raised the objection that the Plaintiff's case was

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barred by the Statute of Limitation; and secondly, the Plaintiff not having produced nor given notice to the Defendant to produce the *Istimrar Sunnud* of the *Zemindar*, no judgment could be passed as to the nature of the property. Now, that appears to be again raising the same question which had been decided before, namely, as to whether this property was acquired property, or whether it had been inherited? It appears to have been originally acquired by one *Zemindar*, but it had descended to the then *Zemindar*, and, therefore, it could not then be properly considered as acquired property. That had been already decided, and that point, once before decided, seems to be intended to be raised again by the second ground of appeal. The third ground proceeds to raise the objection as to the Plaintiff's Mother being entitled to maintenance, and then the fourth is, "The Civil Judge's estimate of the income of the *zemindary* is erroneous, and even opposed to the Plaintiff's own allegation." The fifth is, "The Civil Court has not correctly estimated the wants of the Plaintiff." We need not go at length into the other grounds, but it is to be observed, that these grounds proceed mainly upon an insufficiency of the evidence produced by the Plaintiff, and that they do not in the least degree point to any evidence having been tendered by the Appellant, or having been improperly rejected by the Judge; and under these circumstances, even if the Appellant had any such ground of appeal, if he did not think fit to produce it before the Court, where such an appeal might regularly have been prosecuted, and where such a ground would have afforded a sufficient ground for such an appeal, in the opinion of their Lordships, it is not

competent for him to maintain it now ; and it appears to have been raised for the first time in the petition of the 6th of *August*, 1864, where it is said, "Because your Petitioner was not permitted to prove what the net income of the *zemindary* was." Their Lordships, therefore, are of opinion that that second ground of complaint also fails.

Then it is said, that the decision is erroneous, inasmuch as it is based upon an assumption that the income of the *zemindary* was Rs. 50,000, which is more than has been alleged in the original plaint, which only claimed maintenance as against an income of Rs. 40,000. But in the opinion of their Lordships, this is a misconception of the terms of the judgment. The judgment appears to have proceeded upon this. The Claimant alleges, that the income of the *zemindary* is Rs. 40,000, but the Judge finds, that upon a former occasion, many years ago, it is true, the Appellant had admitted the income to be Rs. 50,000 ; and that on a former occasion, also many years ago, in the year 1831, a sum of Rs. 250 *per mensem*, or Rs. 3,000 a year, had been awarded to another Brother of the *Zemindar* for maintenance. The Judge, proceeding upon that, says, "I find an allegation of Rs. 40,000 on the one side, an admission of Rs. 50,000 on the other, and a former Order allotting for maintenance Rs. 3,000 ; and, in the absence of any evidence to the contrary, the fair inference to be drawn from these documents is, that Rs. 2,000 is a reasonable sum for maintenance, with the addition of a house." Under these circumstances, their Lordships are of opinion, that it cannot with justice be said that the Judge has proceeded upon the foundation of the income being Rs. 50,000, and,

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therefore, in excess of the allegation made by the Plaintiff.

It remains only to notice the other point with respect to the residence. It may, we think, be fairly assumed, that this question was taken into consideration by the Judge in fixing the amount of the maintenance. It was a matter for the discretion of the Judge, and a matter with which this Board would be very reluctant to interfere, unless it could be shown that the Court below had miscarried in some very gross and striking manner. Now, in the opinion of their Lordships, there is no such miscarriage in this judgment, having regard to the documents which were proved, and to the absence of any other evidence. It appears to their Lordships not to be unreasonable to award the sum which has been awarded by the Judge, with the addition of the residence, and, therefore, their Lordships will feel it their duty humbly to advise Her Majesty that this decree should be affirmed, and the appeal dismissed.

IKBALOODOWLAH

Appellant,

AND

SAH BUNARSEE DOSS and MOOK- } *Respondents.**
 RUMOODOWLAH }

On appeal from the Court of the Judicial Commissioner at Oude.

THIS suit, in the nature of an action of trover, was instituted by the Appellant to obtain restitution of nine Government promissory Notes, commonly called Company's paper, or in the alternative to recover their value. These Notes formed a portion of the estate of *Setara Begum*, deceased, the Mother of the Appellant, and the Respondent, *Mookrumoodowlah*.

2nd March,
1869.

Suit in the nature of an action of trover, by the Plaintiff, to recover Company's paper, as heir, such Notes being part of his deceased Mother's estate, against a Purchaser without notice and the Vendor, his Brother, alleging first, that

* Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (The Judge of the Court of Admiralty), the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.
Assessor :—The Right Hon. Sir Lawrence Peel.

the dealing with the Notes on the part of his Brother was illegal and contrary to the Plaintiff's rights as heir; and secondly, that in a previous suit against his Brother, regarding the Notes, he had obtained a decree against him in respect of one of the Notes sued for, but had not enforced judgment. The suit was dismissed by the Courts in *India* on the grounds (1) of limitation, under Act, No. XIV. of 1859, and (2) as barred by the previous suit. On appeal, such decree reversed, as it appeared, that the real point in issue, the validity of the transfer of the Notes, had not been heard, and the suit remitted back to the Judicial Commissioner at *Lucknow*, to give directions to the Court of First instance to rehear the case, with liberty to either party to amend the pleadings.

Costs of appeal to abide the result of the rehearing.

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The first Respondent, *Sah Bunarsee Doss*, was a *Mahajun*, or Banker, of *Lucknow*.

It appeared, that the *Begum* died on the 3rd of *September*, 1856, leaving two Sons and one Daughter, the Appellant, *Mookrumoodowlah*, the second Respondent, and *Hoosainee Khanum*, her legal heirs according to the Mahomedan Law.

The *Begum's* estate consisted of real property claimed by the Appellant by virtue of *hibbeh* (gift), personal and household property which afterwards was amicably divided, and Government promissory Notes of the value of Rs. 59,100 standing in her own name.

A few days after the *Begum's* death, *Hoosainee Khanum* died without issue, leaving *Agha Husun Ruza*, her Husband, her surviving.

The Appellant alleged, that during the first two days of the Indian mutiny, which broke out in the summer of 1857, before the *Begum's* funded property had been divided, or a Certificate of heirship obtained, his Brother broke open a closet in which the Notes in question and his Mother's seal were deposited, and having stamped the Notes with the seal, sold them during the disturbances at an undervalue, without making over to him the share to which as co-heir he was entitled.

In *February*, 1861, the Appellant applied to the Accountant-General, to have the Notes standing in his Mother's name stopped, and in reply was informed, that before his request could be complied with, he must state to what loans they appertained. A correspondence followed, in the course of which the Appellant forwarded to the Accountant-General's Office a detail of seventeen Notes, together with the

number, year, and amount of each, and was informed in reply, that only one of them was then standing in the Register, in the name of the *Begum*, and that payment of it had been stopped in consequence of his application, that five had been paid off by transfer, and that the remaining eleven must have been erroneously described by him, as no such Notes were in existence.

On the 12th of *March*, 1863, the Appellant filed a plaint in the Court of the Civil Judge of *Lucknow*, against his Brother, and a native Banker of the name of *Sheonath*, for the recovery of his share (two-fifths) of the estate of his Mother, and Government Notes of the value of Rs. 23,640, part of the Notes of the value of Rs. 59,100, which their Mother had left; and also for the recovery from *Sheonath* of two Notes, part of the above Notes, of the value of Rs. 2,500, which had been discovered to be in his possession, and in the plaint it was stated, that some of the Notes constituting part of the estate had been parted with by his Brother to other persons, and that as soon as the Appellant had obtained definite information, he would sue for them.

Sheonath made no defence.

In the course of this suit, the Respondent, *Mook-rumoodowlah*, admitted that he had opened the closet, and abstracted therefrom the Notes, and his Mother's seal, which he subsequently impressed upon them, and stated that he had been induced to act thus by reason of his Brother having set up a claim to the whole of their Mother's realty, and by force of circumstances, consequent upon the breaking out of the mutiny.

By a decree, dated the 24th of *April*, 1863, Mr.

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E. G. Frazer, the Civil Judge of *Lucknow*, decided that whatever might be the truth of *Mookrumoodowlah's* statement, he had constituted himself an Executor *de son tort*, and decreed in favour of the Appellant's claim for Government Notes belonging to his Mother's estate to the value of Rs. 23,640, or in lieu thereof that amount in cash, with costs against *Mookrumoodowlah*, and decreed that the two Notes of the value of Rs. 2,500, attached in the hands of *Sheonath*, belonged to the undivided estate of the *Begum*, and as such should be sold and divided amongst her heirs as follows: two-fifths to the Appellant, two-fifths to the Respondent, *Mookrumoodowlah*, and to their Sister one-fifth; but she being dead, half of her one-fifth was to go to her Husband and the other half thereof equally between the Appellant and his Brother; *Sheonath* being left to his proper legal remedy.

These Notes were sold; and *Agha Husan Ruza* having given up any claim thereto, the proceeds were taken out of Court by the Appellant.

On the 4th of *November*, 1862, a Certificate of succession was applied for to the estate of the *Begum*, but was, on the 4th of *April*, 1863, refused on the ground, that neither party could have a certificate until their claims had been decided against each other by a regular suit.

By a petition in the same suit, dated the 22nd *October*, 1863, the Appellant prayed that Notes to the value of Rs. 27,000 (part of the Rs. 59,100) which, as he alleged, had been transferred to one *Dhunput Roy* and the Respondent, *Sah Bunarsee Doss*, by his Brother, the second Respondent, under the seal of the *Begum*, without his consent, should be sent for by issue of a warrant, and that satisfaction of the

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remaining amount of the decree should be made by their attachment and sale.

On the 11th of *December*, 1863, the Clerk of the Court made the following Order:—"Case brought forward this day. Order to be issued to *Dhunput Roy* and *Sah Bunarsee Doss*, under sec. 234 of Act, No. VIII. of 1859, as applied for by the Petitioner, and a copy of the list filed by the decree-holder to be sent, with directions calling upon them to file any objection they might have in Court."

On the same day the Clerk of the Court, acting, as alleged by the second Respondent, in collusion with the Appellant, issued an injunction in the suit in these terms:—"To *Sah Bunarsee Doss*. At the request of the decree-holder, you are hereby directed not to deliver any of the Notes mentioned 30 in the list appended to this, which may be in your possession, to any one until further Orders of the Court, and to bring forward any objection you may have in Court. This injunction is issued under section 234 of Act, No. VIII., 1859."

These proceedings were taken without *Sah Bunarsee Doss* being made a party to the former suit.

The Respondent, *Sah Bunarsee Doss*, in obedience to the injunction, returned a list of nine Notes, to the value of Rs. 27,000, which had been purchased by him in the *Bazaar* during the mutiny, and having been sent to *Calcutta*, were sold there.

By a petition, dated the 19th of *February*, 1864, the Appellant prayed that the Notes, when recovered from the Respondent, *Sah Bunarsee Doss*, might be delivered to him in the same manner as those in the possession of *Sheonath* had been, or that the amount might be paid to him in cash with interest.

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On the 21st of *April*, 1864, the Clerk of the Court, being of opinion, that the suit was not one which could be dealt with in a summary way, ordered that it should be struck out of the list of pending cases.

Having by means of the injunction obtained the discovery he required, the Appellant instituted, on the 6th of *September*, 1864, the present suit against both the Respondents, claiming restitution of nine Government notes, in value Rs. 27,000, (part of the Rs. 59,000 standing in the name of the *Begum*,) as having been wrongfully obtained by the first Respondent, by illegal purchase from the second Respondent during the late mutiny, and after the death of the Owner of the Notes, or in the alternative, their money value; and alleging that as the Respondent, *Sah Bunarsee Doss*, had not stated to whom he had transferred the Notes, it was believed that he had either caused the renewal of them in his own name, or obtained from the Treasury fresh Notes in his own name by increasing the value of those under litigation, and praying that in order to ascertain the real facts of the case the Notes claimed might be sent for from *Calcutta* and delivered to him, or that the Respondent, *Sah Bunarsee Doss*, might be ordered to pay the value of them with interest and costs.

The Respondent, *Sah Bunarsee Doss*, pleaded, first, that the Appellant ought not to be allowed to reap any benefit from the discovery which he had obtained by fraud; secondly, that Notes sold in the *Bazaar* under the genuine seal of the Owner were validly sold; thirdly, the six years' limitation law; and fourthly, that the Appellant had already sued on the ground of inheritance, and had obtained a decree.

By a decree, dated the 7th of *March*, 1865, the

Civil Judge of *Lucknow* (Mr. *E. G. Fraser*), after stating it to be his belief that the suit was one of a collusive character got up by the two Brothers, dismissed it with costs on the following grounds:—First, that the claim was barred by limitation; and secondly, holding that there having been a money decree against his Brother, the Respondent, *Mookrumoodowlah*, the Plaintiff had no right to another against the Respondent, *Sah Bunarsee Doss* and that even if there had not been any pre-adjudication he could only obtain disclosure by equity, from which, by being party to the issue of an illegal injunction, he had debarred himself.

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The Appellant appealed from this decree to the Judicial Commissioner of *Oude*, and *Sah Bunarsee Doss* put in an answer.

On the 27th of *June*, 1865, Mr. *George Couper*, the Judicial Commissioner, dismissed the suit with costs against the Respondent, *Sah Bunarsee Doss*, on the ground that, so far as the Respondent, *Sah Bunarsee Doss*, was concerned, there was nothing whatever to show, nor any reason to suppose that the transaction on the part of *Sah Bunarsee Doss* was not *bonâ fide*.

The present appeal was from this decree.

Mr. *Leith*, for the Appellant.

There was no fair or full trial of this suit in the Court of the Civil Judge of *Lucknow*, the Court of first instance; and there has been, therefore, from the first, a miscarriage in justice to the loss and injury of the Appellant. The Judicial Commissioner on appeal ought to have directed a remand of the suit for re-trial upon proper pleadings and evidence.

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Although the Judicial Commissioner was right in not affirming the decree of the Lower Court on the two grounds of law on which it was based, namely, the bar of a former decree, and the bar of the expiration of the period of limitation, *Wise v. Bhoobun Moyee Debia Chowdrainee (a)*, yet his decree was manifestly unjust in dismissing the suit solely on what he himself, in his judgment, terms a "presumption" that the alleged transfer of the stolen Notes in question to the Respondent, *Sah Bunarsee Doss*, was a *bonâ fide* transaction. It is a settled doctrine, that a Vendee cannot have a better title than the Vendor, except in the instance of a sale in market overt. *Wms. Saunders*, Vol. II. note [e] p. 47 b. A sale by one Tenant in common of a chattel is not a conversion to support an action of Trover, because the sale passes only the interest of the seller, which may be sued for, but otherwise of a sale of chattel in market overt, which deprives the co-tenant of his share and interest in the chattel.

Sir. *R. Palmer*, Q.C.; Mr. *Mackeson*, Q.C.; and Mr. *J. Edwards*, for the Respondent, *Sah Bunarsee Doss*.

As there was no division of the Notes among the co-heirs, there was, consquently, no evidence to show that the Notes in question were the property of the Appellant more than of his Brother. There has been no certificate of succession to the estate of the *Begum*, as is required by Act, No. XXVII. of 1850, sec. 48, to vest the estate. This Respondent having purchased such of the Notes in question at the market value,

(a) 10 Moore's Ind. App. Cases, 165.

and without notice of any fraud on the part of the Respondent, *Mookrumocdowlah*, he is not liable under section 9, ch. xiii. part I. of the *Punjaub* Code. No allegation of fraud as against this Respondent is to be found in the pleadings. With respect to the right to sue, the limitation applies only as between heirs. Here the suit is barred, first, by the former action, and secondly, by effluxion of time. As the Appellant has already sued, and obtained a decree in his favour for his share in full, he has waived his right to bring a second action, Civil Code Procedure Act, No. VIII. of 1859, section 2.

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Judgment having been reserved, was now delivered by

11th March,
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The Right Hon. the Lord Justice GIFFARD.

This appeal is brought from a decree of the Judicial Commissioner of *Oude*, confirming a decision of the Civil Judge of the Court of *Lucknow*, which dismissed the Plaintiff's suit.

The Plaintiff by his suit sought to recover from the first Defendant, *Sah Bunarsee Doss*, certain Promissory notes, commonly called Company's paper, of the Indian Government, which he alleges to have been illegally sold during the Indian mutiny. He claims either restitution of the Notes, or alternatively, their value. He states that his claim is based on inheritance. It is obvious on the fact of the plaint that he means to describe inheritance as the base or root of his title to the property, and that he alleges the illegal sale or transfer of, and the illegal dealing with, the Notes, as the wrong done to him, and that the alleged violation of his right constitutes

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his cause of action. The Plaintiff was the eldest Son of his Mother, who died possessed of a considerable property, consisting of land, movables, and certain Promissory Notes, of which those in question are part. It was a Mahomedan family. The family consisted of two Sons and a married Daughter. The eldest Son claimed the land under an alleged gift from his Mother in her life-time, a gift the validity of which was disputed by his Brother at least. The Sister survived her Mother but a few days: the Brothers and Sister were entitled to the Mother's property as heirs under the Mahomedan law: the Brothers taking equally each the double of their Sister's share, and on their Sister's death they took certain shares with her Husband in the Sister's share. Soon after the Mother's death, the Son and Daughter proceeded to make some division of the movables: the elder Son claimed the land: that title was litigated by the younger Brother, but it does not appear with what justice or success. The more valuable part of the movable estate consisted of Government paper, amounting to Rs. 59,100, in which each Son's share would be of the value of Rs. 23,640; and the Daughter's of Rs. 11,820. The Daughter is stated to have received her share of this part of the property. The Daughter's Husband appears to have disclaimed.

The Plaintiff's right of suit in this action, is founded upon an alleged illegal dealing by the younger Brother with his elder Brother's share of this property, and he seeks to extend his right and remedy against the first Defendant, by treating him as an illegal Purchaser under and consequent upon his Brother's alleged spoliation. The mode in which the

Plaintiff alleges this wrong to have been effected is this, viz., that the Notes were secured under the separate seals of the heirs, in a House belonging to the estate, in which the Mother died, and her Sister continued to reside; that the younger Brother, about the commencement of the Mutiny, broke the seals, carried off the property, and, alone sold and purported to transfer it. If this statement be true, and reference be had to the nature of the property sought to be recovered in this suit, viz., Company's paper, and reference also be had to the first Defendant's Letter of the 30th of *July*, 1865, it follows, that the first Defendant would be under the legal obligation of showing title to the Notes purchased. The law applicable to the acquisition of title to Notes passing by indorsement, as these appear to have been capable of being passed, must not be confounded with that applicable to the acquisition of title in ordinary chattels.

The Plaintiff had, previous to the institution of this suit, brought a suit of a similar nature against his Brother, the second Defendant, and one *Sheonath*, to whom two of the Notes had been traced. In that suit he recovered judgment against his Brother, who did not deny the case made, but excused it on insufficient grounds. The Plaintiff, having succeeded in this suit, is not shown to have taken any steps to enforce his judgment against his Brother. There is no proof whatever that the Brother is insolvent, or incapable of satisfying that judgment; nor is there any proof, whether the elder Brother's alleged title to the land is valid, nor of the value of that part of the property of the deceased.

After this judgment had been obtained, the Plain-

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tiff having acquired some information (at what precise time, however, does not appear), desired to enforce it by process against the promissory Notes, the subject of the present suit, which he alleged he had traced to the possession of the first Defendant. If this could be done at all, under the execution of the process of the Court, it could be done only by attaching specific property still in the possession of the person against whom execution of the decree was sought to be extended. But such a proceeding would be totally irregular and infructuous against a person who had parted with the Notes.

The application appears to have been for an attachment and sale. A process of injunction was issued instead. This was held by the Court as a wilful abuse by the Plaintiff of the process of the Court, and its own Officer was treated as an accomplice in the wrong; but as it would be substantially little more operative than the process actually prayed, and neither process in terms sought discovery, there appears to be quite as good reason to attribute this proceeding to ignorance and blundering as to conscious fraud in the Plaintiff or his advisers. The result was to obtain from the first Defendant an admission of which the Plaintiff claimed to make use as evidence, but which the Court rejected as proof.

The Plaintiff having obtained this advantage, which involved a partial discovery, filed his plaint in this suit, to which the first Defendant's defence was : first, that the Plaintiff ought not to be allowed to reap any benefit from the discovery which he had thus obtained. Secondly, that Notes sold in the *Bazaar* under the genuine seal of the Owner were validly sold. Fourthly, the limitation law; and fifthly,

that the Plaintiff had already sued on the ground of inheritance, and had obtained a decree. The evidence adduced by the Plaintiff seems to have been entirely documentary. The admission of the Brother in the former suit was used in this, and as against the Brother it was legitimate evidence, though not evidence such as to establish the case of wrong against his co-Defendant. The Letter of the first Defendant of the 30th of *June*, 1855, on the occasion of the injunction, was also attempted to be put in evidence. There was no clear or distinct evidence of the state of the indorsements on the paper, and no sort of evidence was given or attempted, of any legal transfer of the paper to the first Defendant.

In this state of things the first Court dismissed the Plaintiff's suit—first, on the ground that the suit was barred by limitation; and next, that holding a money decree against his Brother, the Plaintiff had no right to another against *Sah Bunarsee Doss*; and lastly, the Letter of the 30th of *June*, 1865, was excluded, but in their Lordships' judgment erroneously, on the ground of its having been obtained by the Plaintiff as being a party to an illegal and collusive Injunction.

From this decree the Appellant preferred his appeal to the Judicial Commissioner. *Sah Bunarsee Doss* put in an answer to the appeal.

The Judicial Commissioner dismissed the suit with costs as against *Sah Bunarsee Doss*, on the ground that there was nothing whatever to show, nor any reason to suppose, that the transaction on the part of *Sah Bunarsee Doss* was not *bonâ fide*.

The statement of these decisions shows, that the case of the Plaintiff has been viewed and treated by the Courts as though the *onus* of proof rested on him

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to rebut a presumable *bonâ fide* title by transfer in the first Defendant, *Sah Bunarsee Doss*. But the case made as to these papers is, that they were not in a state wherein a transfer, by delivery to a *bonâ fide* holder, would confer a title. On the contrary, it is stated that the legal title was in the Mother, and required a transfer by indorsement from her or all her heirs. Supposing that a mere imposition of a seal by a native Lady would be recognized as a legal transfer by indorsement, of which there is no allegation or proof, still such a transfer would not be valid after the death of the Mother. An invalid transfer might still confer a valid equitable title, either in part or in entirety; but such a transfer, being exceptional and dependent on special circumstances, cannot be raised by legal intendment or presumption. Consequently, the Plaintiff's case required an answer, unless met on other grounds; those on which the Court proceeded, of suspected collusion between the Brothers, would, if alleged and proved, have constituted a valid defence. A Plaintiff, however, ought not to have a defence of this sort urged against him at the hearing without due notice by the pleadings and issues of a case of fraud; and, as in a suit before the same original Tribunal, the admission made by the younger Brother had been credited and acted on, and formed the basis of a decision against him in the Plaintiff's favour, the Plaintiff had the less reason to come provided with proof to rebut that charge. The existence of a judgment against the Brother is no bar to this suit.

Again, the objection that the suit is barred by limitation seems to have been founded on a neglect to consider the Act of Limitation applicable to the

suit, viz., the Act, No. XIV. of 1859, which, on the facts alleged, furnishes no ground whatever for it.

Then there is another objection founded on the want of a Certificate. This appears not to have been taken in the Court below, and is entirely inapplicable to a suit of this character.

The Act which provides for the granting of a Certificate is intended for the protection of Debtors to a deceased's estate ; but *Sah Bunarsee Doss* was never a Debtor of the Mother, nor did his taking the share, or property, or part of the share, or property, of the Plaintiff, by an invalid title, constitute him a Debtor to the estate. The right of action is founded entirely on wrong, and not on privity of contract. Their Lordships, therefore, must humbly advise Her Majesty to allow this appeal, and direct that both decrees be reversed, and that the cause be referred back to the Judicial Commissioner, in order that he may give the necessary directions that it be reheard by the Civil Judge of the Court of *Lucknow*, with liberty to either party to add to or amend the pleadings ; and that the costs of the appeal on both sides should be taxed, and be costs in the suit, and abide the result of the suit.

In arriving at this conclusion, their Lordships have no intention whatever of giving any judgment on the merits. They are simply of opinion, that the facts ought to be inquired into on proper pleadings and evidence, including the first Defendant's Letter of the 30th of *January*, 1855, if the Plaintiff so desires it ; and if the Plaintiff should prove his title as against the first Defendant to the whole or part of the Notes, then that the first Defendant ought to be called on to show, if he can, either title in himself, or some

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grounds displacing the Plaintiff's right to complain of his acts ; and that thus the facts and the real merits of the case should be arrived at.

Their Lordships are further of opinion, that the second Defendant ought not to have been dismissed ; for if the Plaintiff has any right against the first Defendant, it may be that the first Defendant, if he makes satisfaction to the Plaintiff, ought to have the benefit of any subsisting judgment against the second, or, at all events, to have some remedy by way of indemnity or otherwise over against him ; it must in this point of view be obviously for his benefit that the second Defendant should be bound by all the proceedings in this suit ; the Plaintiff having brought the second Defendant before the Court, he, under the circumstances, ought not to be dismissed unless the whole suit should eventually fail on the merits against the first Defendant.

NEELKISTO DEB BURMONO ... *Appellant,*

AND

BEERCHUNDER THAKOOR and others ... *Respondents.**

*On appeal from the High Court of Judicature at
Fort William in Bengal.*

THE question in this appeal involved the right of succession to the ancient *Raj* of *Tipperah* of the Hills, and arose out of a suit brought by the Appellant against *Beerchunder Thakoor*, the principal Respondent, in the nature of an action of ejectment, to

8th, 9th, &
15th March,
1869.

The normal state of every Hindoo family is joint, the presumption in the absence of proof of division being, that the family is joint in food, worship, and estate.

^c Present :—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. Sir R. Phillimore (The Judge of the Court of Admiralty) and the Right Hon. the Lord Justice Selwyn.
Assessor :—The Right Hon. Sir Lawrence Peel.

Where a family custom of descent to single heir, as in the case of a *Raj*, is proved to exist, such custom supersedes the general Hindoo law, which still however regulates all beyond the custom.

Suit in the nature of an ejectment by N., the half-brother of the late *Rajah* of *Tipperah*, to recover from B., his uterine Brother, in possession as *Rajah*, a *zemindary* forming part of the *Raj* of *Tipperah*, impeaching the title of B. as not having been validly appointed *Jobraj* (or young Sovereign), according to the family custom, by the late reigning *Rajah* on grounds first, of an alleged promise by a former *Rajah*, that N. should succeed, and secondly, that he was the eldest living of a class out of which, according to the family custom, a *Jobraj* could alone be selected. The family custom being proved, and that the late *Rajah* appointed B. as *Jobraj*:—Held, affirming the judgment of the High Court:—

First, that B. was duly appointed *Jobraj* by the last-reigning *Rajah*, and,

Secondly, that the right of succession to the *Raj* was governed by *Koolacher*, or family custom, and devolved on B., as there was no restriction by the family custom on the reigning *Rajah* obliging him to appoint the eldest of his kindred *Jobraj*.

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recover from such Respondent, the *Rajah* in possession, a *zemindary* and, other real estate forming part of the *Raj*, with mesne profits.

The Respondent, *Beerchunder Thakoor*, had been recognized as *de facto Rajah* of the *Raj* by the Government.

The issues raised, resolved into these points:—

First, whether *Maharajah Essanchunder Manicko*, the last *Rajah*, had power of his own free choice, to appoint the Respondent, *Beerchunder Thakoor*, the *Jobraj* (or young Sovereign) in preference to the Appellant, a senior member of the family, and nearest of kin.

Second, whether as a question of fact, he did so appoint him, and,

Third, supposing no valid appointment of the Respondent, *Beerchunder Thakoor*, as *Jobraj*, to have taken place, who was entitled to succeed to the *Raj* by descent?

The Appellant set up a title as the eldest legitimate member of the family of the *Rajahs* of *Tipperah*, who are entitled as well to the *Raj* of *Tipperah* of the Hills, as also to estates part of which belong to independent Territories of the Kingdom, and the remainder consisting of the *zemindary* of *Chucklay Rowshunabad* and other estates, situated, within the British dominions, which were the subject of the suit, and were claimed by the Appellant from the Respondent (the younger Brother by a different *Ranee*), who on the death of *Maharajah Essanchunder Manicko* (the elder Brother of both), took possession of the *Raj* and estates, by virtue of his appointment as *Jobraj*, under the family custom, the validity of which was disputed by the Appellant.

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It appeared that a special custom existed in the family of the *Maharajahs* of *Tipperah*, by virtue of which the *Rajah* nominates from amongst the members of his family as his presumptive successors, first the *Jobraj* (young Sovereign), second the *Burra Thakoor* (Chief Lord), and when these appointments are full at the time of the demise of the *Rajah*, the *Jobraj* succeeds to the Throne and the *Burra Thakoor* succeeds as *Jobraj*, the new *Rajah* making a fresh appointment of *Burra Thakoor*, and in default of any such appointment being full on the demise of the *Rajah*, the next male member of the family succeeds to the vacant *Raj* and estates (a).

The suit was brought by the Appellant in the Court of the Principal *Sudder Ameen* of *Zillah Tipperah*, against the Respondent, *Beerchunder Thakoor*, *Beepin Beharree Gossamee*, the spiritual guide of the late *Rajah Essanchunder Manicko*, *Brojomohun Thakoor*, *Gooroodoss Burdhun*, and *Bissonath Goopto*, all severally Officers and servants attached to the *Raj*, as Defendants. The Plaintiff sought to establish his right of succession to the *Raj* and its possessions aforesaid, and in particular, to oust the Respondent, *Beerchunder Thakoor*, from possession of the *zemindary*, *Talooks* and Houses within the jurisdiction of the *Zillah* Court. The plaint stated, amongst other things, that the Respondent, *Beerchunder Thakoor*, in collusion with the other Defendants, took possession of the *zemindary*, &c., by fraud and without having any right at all, on the false allegation of his having been appointed

(a) See 1 Sud. Dew. Ad. Rep., 279 ; 2 Sud. Dew. Rep., 139 ; and 3 Sud. Dew. Ad. Rep., 40, where this special family custom was recognized and upheld.

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Jobraj, Brojendro Chunder, a Minor King, *Burra Thakoor*, and *Nubdeep Chunder, Kurta*; that his Brother, the late *Maharajah Essanchunder Manicko*, was attacked with paralysis, and was confined to his bed; that he was not in the enjoyment of his senses, and in that state, without appointing any one as *Jobraj, &c.*, departed this life at ten o'clock A.M. on the 17th *Srabun*, 1269, B. E. That thereupon agreeably to the custom and usage prevalent in the Royal family of *Tipperah*, the Appellant, being the eldest Son of the late *Maharajah Kristo Kissore Manicko*, the principal Respondent being his younger Brother, and under the authority of his Father was, during the lifetime of his Brother, entitled to the post of *Jobraj*; that during his lifetime no other person could get the post, nor could the *Maharajah* give it, nor did he give it; that after the demise of his Brother, the *Maharajah*, he was entitled to the Throne of the Kingdom and the *Zemindaries*, and he sought to obtain possession of the estates claimed with mesne profits and interest.

The Respondent, *Beerchunder Thakoor*, the principal Defendant, by his answer submitted, that agreeably to the custom and usage prevalent in his family the Kingdom as well as the *Zemindaries, &c.*, devolve on the demise of the *Maharajah* upon the *Jobraj*, and in his absence upon the *Burra Thakoor*; that the Plaintiff was neither *Jobraj* nor *Burra Thakoor*, and his claim for the *zemindary*, therefore, was untenable; that the Respondent was the uterine Brother of the late *Maharajah Essanchunder Manicko*, and his favourite, and that being in the enjoyment of his senses and of his free will, he did in a regular form, on the 16th *Srabun*, 1269, B.E., corresponding with 1272, *Tippe-*

rah Era, appoint the Respondent as *Jobraj*, his eldest Son, *Brojendro Chunder*, as *Burra Thakoor*, and his second Son, *Nubdeep Chunder*, as *Kurta*, and departed this life on the 17th *Srabun*, when in his full senses; that accordingly, in conformity to the family custom, the Respondent, by virtue of his position as *Jobraj*, was entitled to the Sovereignty and *zemindaries*, &c., real and personal properties, left by the deceased *Maharajah*; that all the allegations made by the Plaintiff with reference to the deceased *Maharajah* having breathed his last in an insensible state, without appointing a *Jobraj*, were false; he submitted, that it was not the family custom to obtain the post of *Jobraj* by seniority. That the appointment as well of *Jobraj* and the others, to be the successors to the Sovereignty, resting solely on the will of the *Maharajah*; consequently, when, on the demise of his Father, the late *Kristo Kissore Manicko*, his Brother, the late *Maharajah Essanchunder Manicko*, had become King and proprietor of all *Zemindaries*, &c., he was *Rajah* and proprietor of all the property, and had the entire right to appoint heirs. That the *Maharajah* did not appoint the Plaintiff a *Jobraj*; hence, the claim of the Plaintiff, that he was entitled to the post of *Jobraj*, on the allegation that, as to the matter of *Jobraj*, he had the permission of his deceased Father; and among the Sons from his married Wife, *Essurree*, he, the Plaintiff, was the eldest, and was, therefore, by right as *Rajah*, entitled to the property at issue, was utterly groundless, and also, that the averment in the plaint of the alleged permission, was false. That in the absence of the *Jobraj* and other heirs to the Kingdom, the next of kin to the deceased *Rajah* was entitled to succeed as heir to the properties left

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by him. That the Plaintiff was not a person of that description either, so that his claim to the disputed properties against the Defendant was not admissible by any means; and the answer finally submitted, that the disputed properties were under the Sovereignty of *Tipperah*, and he, the Respondent, had become entitled to the Kingdom by virtue of *Jobraj*; consequently, the claim of the Appellant to the estates subject to it, was not tenable, and his claim for mesne profits of the *zemindary* connected with the Kingdom was groundless.

A separate answer was filed by the Defendant, *Gooroodoss Burdhun*, in which he stated, that the allegation of the Plaintiff that the *Jobraj*, *Burra Thakoor*, and *Kurta* had been appointed by his collusion, and that the principal Defendant had taken possession of the disputed properties in collusion with him was false.

A suit, No. 9, of 1863, had been brought by one *Chuckherdhuj*, an illegitimate Son of *Kishen Kissore*, a former *Rajah*, against the Respondent, claiming as eldest surviving Son, to succeed to the *Raj*, and dismissed, and he petitioned under Act, No. VIII. of 1859, sec. 73, to be made a party to the Appellant's suit. By an Order of the Court, *Chuckherdhuj* was made a Defendant in the suit.

Chuckherdhuj, by his answer asserted his former claim, and stated that the allegation of the Plaintiff's averment in his plaint with reference to the permission or authority alleged to have been given by *Kishen Kissore* was utterly false, and was set up as a fact on the strength of the evidence of witnesses under his own control; and that the *Rajah* of *Tipperah* could not act in opposition to the family custom. The answer

further stated, that the late *Maharajah* had not appointed a *Jobraj* in his lifetime, and submitted and charged that, by being next of kin to the deceased *Maharajah*, the chief Defendant was not on that account entitled to succeed to the *Raj*.

Issues were framed conformably to sec. 10 of Reg. XXVI. of 1814. First, with regard to the succession to the disputed *zemindary*, what custom there was in the families of the two litigants, and whether to become proprietor of the properties, there was the rule of seniority by birth or not? Second, was it the family custom or not for the *Rajah* to appoint a *Jobraj*, and for the *Jobraj* to be the proprietor of the *zemindary*, &c., on the demise of the *Rajah*? Third, was there the custom of appointing a *Jobraj* according to priority, and did it take place according to the wishes of the *Rajah*, and what was the exact custom with regard to it? Fourth, did the late *Rajah Essanchunder Manicko* in his lifetime appoint the Defendant (the Respondent), *Beerchunder Thakoor*, as *Jobraj* according to the established and family custom or not? Fifth, in the event of no *Jobraj* having been appointed by the *Rajah*, with regard to succession to the disputed *zemindary*, which of the two litigants had a preferential right? Sixth, was *Chuckherdhuj*, a Son born of the late *Rajah Kristo Kissore Manicko's* married or *Santigrihita* Wife or not? and if not, then could it be prejudicial to his claim? Seventh, were the Defendants, *Gooroodos* and others, unconnected with this suit or not?

Evidence was entered into by both sides, the material portions and effect of which is stated in their Lordships' judgment.

The hearing of the two suits, namely, first, the suit

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distinguished as No. 9 of 1863, instituted by *Chuckerdhuj*, and secondly, the suit out of which the present appeal arose, took place together, on the 11th June, 1864, before *Juggobundhoo Bannerjee*, the Principal *Sudder Ameen* of *Zillah Tipperah*, upon the same evidence. By his judgment he dismissed *Chuckerdhuj's* suit, and decreed the possession of the *zemindaries*, &c., to the Appellant. The judgment then proceeded to state, that the late *Maharajah Essanchunder* did not appoint any one to the post of *Jobraj* during his lifetime, and that this appeared from the evidence of the *Rance*, the Widow of the late *Rajah Kasseechunder*, and of her Daughter, and also from the evidence of certain *Thakoors*, and declared, that it was satisfactorily established, that in this royal Family a custom had always prevailed of appointing heirs in the order of seniority. It then decided, that although the Respondent, *Beerchunder Thakoor*, was uterine Brother of the late *Maharajah*, yet that the Appellant, being senior in age, was entitled to succeed under and by virtue of the family custom, and that as between *Chuckerdhuj*, the Plaintiff in the other suit, and the Appellant, the latter was entitled to succeed to the late *Maharajah*, because the former was the Son of a *Katchoo* (Slave or maidservant), and, therefore, illegitimate. The judgment concluded in these terms:—"Under these circumstances, when *Neelkisto Deb Burmono*, who is senior in age and high in birth, it is not legal that his younger Brother should possess the *zemindaries*, &c., consequently in all respects the Plaintiff, with regard to taking possession of the properties claimed, is the preferential heir and is entitled as of superior right. But according to the rules of the family the Plaintiff, being proved to be the owner of the disputed

properties, it is not necessary to enquire and see whether, with regard to his getting the posts concerning the *Raj*, there was his Father's permission or not. As the colluding Defendants have fully assisted the Defendant, *Beerchunder Thakoor*, in setting himself up as the feigned *Jobraj* they are not exonerated from costs. On these considerations it was ordered, that the claim of *Chuckerdhuj*, the Plaintiff in suit No. 9, be dismissed, with costs; that the claim of *Neelkisto Deb Burmono*, the Plaintiff in suit No. 78, be decreed, that the Plaintiff in suit No. 78, be put in possession of the disputed *zemindaries*, &c., and get his costs from all the other Defendants, except *Chuckerdhuj*; that the Defendants in suit No. 9, do receive their costs from the Plaintiff, *Chuckerdhuj*; that the *Ranees* bear their own costs. That the Plaintiff in suit No. 78, receive from the Defendant, *Beerchunder Thakoor* mesne profits, which will be ascertained at the time of the execution of decree, together with interest.

From the decree founded on the above judgment, the Respondent, *Beerchunder Thakoor*, appealed to the High Court at *Calcutta*.

The appeal was heard before the High Court, the Justices *Norman* and *Kemp* presiding, who on the 26th of *September*, 1864, pronounced judgment, stating at great length their reasons for dismissing the suit, and reversing the judgment of the Principal *Sudder Ameen*. After a full examination and consideration of the evidence they were of opinion, that the appointment of the Respondent, *Beerchunder Thakoor*, as *Jobraj* was proved, and on that ground held, that he was entitled to the property, and they also hold, that independently of his title as *Jobraj*

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he had, as Brother of the whole blood of the deceased *Maharajah*, a preferable claim by inheritance to that of the Appellant.

The present appeal was from this decree.

Pending the appeal from the High Court, an application was made on behalf of the Appellant for an Order to restrain the Respondent from doing any act whereby the *Raj*, &c., the property in dispute in the appeal, might be damaged; and for the appointment of the Collector of the District, as Manager and Receiver, to prevent the Government Revenue falling into arrears, and so rendering the *Raj* liable to be sold.

Their Lordships, after hearing Counsel on behalf of the Appellant, dismissed the application with costs, expressing their opinion, that no case was shown for asking for such an unusual interference with the right and interest of the Respondent who was in possession of the *Raj* by his own title, as well as the decree of the High Court; and that the Court below alone, if any, had authority to interfere in the manner asked for; though in their Lordships' opinion, no grounds were shown which could justify such a proceeding.

The case of the Appellant on appeal was, that *Maharajah Essanchunder Manicko* did not appoint the Respondent, *Beerchunder Thakoor*, to be *Jobraj*, but that, even if such appointment had taken place, it had not the effect of enabling *Beerchunder Thakoor* to succeed to the *Raj* and estates of the *Maharajah* in preference to, and the exclusion of, the Appellant, the elder member of a class of the family, named to succeed to the Kingdom by a former *Rajah*.

On the part of the Respondent it was submitted, first, that the suit being in the nature of an action

of ejectment, the Appellant could only recover by strength of his own title, which he had failed to do. Secondly, that as the Appellant, while admitting that *Koolachar* or family custom governed the descent of and succession to the *Raj* of *Tipperah*, including the *zemindaries*, &c., sued for, and that, by virtue of the power vested in him by such custom, the *Rajah* for the time being could appoint his successor with the title of *Jobraj*, had failed to establish by evidence, that such power was limited and restricted in its exercise, so that the *Rajah* could only legally appoint the eldest male member of the family then living, or controlled by the wishes of a former *Rajah*, which fact was denied; thirdly, that he was duly appointed *Jobraj* by the *Rajah*; and lastly, that he was by the Hindoo Law of inheritance, as full-blood Brother of the last *Rajah*, entitled to succeed, even if he had not been appointed *Jobraj*.

Mr. *Field*, Q.C., and Mr. *J. D. Bell*, for the Appellant.

As to the nature of a *Raj* by Hindoo Law, and that with respect to a *Raj* there was no preference of half-blood to whole blood, they cited the following authorities, *Colebrooke's* Dig. Vol. II., pp. 119, 121; *W. H. Macnaghten's* "Hindu Law," Vol. I. p. 17; *Strange's* "Hindoo Law," Vol. I. pp. 198, 208; *Strange's* "Manual of Hindoo Law," p. 61; *Rawut Urjun Sing v. Rawut Ghunsiam Sing* (a); *Baboo Gunesh Dutt Singh v. Maharajah Mohesher Singh* (b); *Naragunty Lutchmeedevamah v. Vengama Naidoo* (c); *Katima Natchear v. The Rajah of Shiva-*

(a) 5 Moore's Ind. App. Cases, 169.

(b) 6 *Ib.*, 187.

(c) 9 *Ib.*, p. 66.

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gunga (a) ; *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee (b)* ; and, as to the special family custom in this *Raj* for the reigning *Rajah* to nominate his successor a *Jobraj* they referred to *Ramgunga Deo v. Doorgamunee Jobraj (c)* ; *Urjun Manic Thakoor v. Ramgunga Deo (d)* ; and *Ranee Soomitra v. Ramgunga Manik (e)*.

At the conclusion of the Appellant's case, the further hearing of the appeal was adjourned.

Sir *R. Palmer*, Q.C., Mr. *Forsyth*, Q.C., Mr. *Leith*, and Mr. *Doyne*, appeared for the Respondent, *Beerchunder Thakoor*, but were not called upon.

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Their Lordships' judgment was delivered by
The Right Hon. Lord CHELMSFORD.

This is an appeal from a decision of the High Court at *Calcutta*, which reversed a decision of the Principal *Sudder Ameen* of the *Zillah* of *Tipperah*. The suit was one in the nature of an ejectment brought by the Appellant, the half-Brother of the late *Rajah* of *Tipperah*, *Essanchunder*, against the Respondent, *Beerchunder Thakoor*, the uterine Brother of *Essanchunder*, and against the other Respondents, to recover a very valuable *zemindary*, being that part of the royal possessions of the *Rajah* of *Tipperah* which lies within the Indian territories of the British Crown. The *Rajah* of *Tipperah*, though in respect to these lands subject to the laws and Courts of *British India*, is in fact an independent Prince with

(a) 9 Moore's Ind. App. Cases, 589.

(b) *Ante*, p. 1.

(c) 1 Sud. Dew. Ad. Rep., 270.

(d) 2 Sud. Dew. Ad. Rep., 139.

(e) 3 Sud. Dew. Ad. Rep., 40.

a considerable territory known as the *Tipperah* Hills, and as the title to the *zemindary* and to the *Raj* is the same, the dispute respecting the former involves a question of the right of succession to the *Musnud* or Throne of the independent Principality. The Respondent, *Beerchunder Thakoor*, has been acknowledged by the British Government as *de facto* Sovereign of *Tipperah*, but this acknowledgment has been regarded in the Court below as determining nothing more than his present and actual possession of the Throne, and their Lordships will deal with the question between the parties as if the litigation were between two ordinary subjects of the Crown upon a disputed title to lands within the jurisdiction of the Indian Courts.

The Appellant, included originally as Defendants to the suit four persons besides the Respondent, *Beerchunder Thakoor*, viz the third, fourth, fifth, and sixth-named Respondents in the appeal, being the spiritual guide, and the servants of the deceased *Rajah*. He charged that these four Defendants colluded with *Beerchunder Thakoor*, to obtain by fraud the *Raj* and the *zemindary* in question. Another Defendant, the second on the record, was made a Defendant on his own petition. He was an illegitimate Son of *Kristo Kissore*, the Father of that Defendant and *Beerchunder Thakoor*; and the Ladies whose names appear on the record, being the Mothers of infants whose legitimacy was disputed, were made parties by the act of the High Court on a petition addressed to it in the progress of the litigation. In disposing of this appeal, however, it is unnecessary, in their Lordships' view, to consider the cases made for or against any of these parties. It will be suffi-

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cient for the purpose of their decision, to treat the suit as being in the nature of an ejectment brought by the Appellant against the Respondent, *Beerchunder Thakoor*, alone.

Maharajah Essanchunder, had one legitimate Son, *Brojendro Chunder*, who survived him. He was not made a Defendant in this suit. He died after its commencement at some early stage of its progress, but this event affects in no way the questions either of law or fact at issue in this suit.

After *Essanchunder's* death, *Beerchunder Thakoor* claimed and obtained the Throne. His claim was founded on an appointment of him as *Jobraj* by *Essanchunder* the deceased *Rajah*, who, it was alleged, had the day before his death, being the 16th *Srabun*, 1269, or the 31st of *July*, 1862, duly appointed *Beerchunder Thakoor*, *Jobraj*, his legitimate Son, *Brojendro Chunder*, *Burra Thakoor*, and an illegitimate Son, *Kurta*. The fact of this appointment was denied by the Plaintiff, who charged it to be false and fraudulently concocted between *Beharry Gosseen*, the family Priest, *Brojomohun Thakoor*, *Goorodoss Burdhun*, and *Bissonauth Goopto*, all Officers in considerable trust and employment under the deceased *Rajah*, and who are respectively the third, fourth, fifth, and sixth Defendants on the record.

Before the institution of the Plaintiff's suit, the second Defendant, *Chuckerdhuji*, filed a suit of a similar character with the present against *Beerchunder Thakoor* and others, and the present Plaintiff intervened in it as a Defendant. That suit and the present were treated as substantially involving the same questions, and were heard together; much of the evidence in this suit was taken in the other.

The suit of the second Defendant, *Chuckerdhu*, was dismissed by the Principal *Sudder Ameen* on the ground of his illegitimacy; he did not appeal from that decision, and his claim may, therefore, be treated as no longer in question.

It is not necessary to consider minutely the pleadings in the cause, or the issues settled between the parties. Their Lordships will only observe, in answer to an argument of Mr. *Field* upon these issues, that, in their judgment, they do not in any degree relieve the Appellant from the obligation which lay upon him as Plaintiff in a suit, in the nature of an ejectment, of recovering by the strength of his own title, and of showing not merely that the Defendant's title was bad, but, that failing that title he, the Plaintiff, was entitled to the possession of the lands in question.

The questions to be determined upon this appeal are simply these :—

First, had *Essanchunder Manicko* the power of appointing *Beerchunder Thakoor*, *Jobraj* in preference to the Appellant?

Second, did he in fact so appoint *Beerchunder Thakoor*?

Third, supposing there was no valid appointment of *Jobraj*, who was entitled to succeed to the *Raj* and the *zemindary* in question, or is now entitled thereto?

The two latter questions were decided in favour of the Appellant by the Principal *Sudder Ameen*; all three questions have been determined by the High Court in favour of the principal Respondent.

It is admitted, that the right of succession to both *Raj* and *zemindary* is governed not by the general law, but by *koolacher*, or family custom. This custom had

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been the subject of investigation, trial, and decision in the Courts of the East India Company in the early part of this century in the case of *Ramgunga Deo v. Doorgamunee Jobraj* as reported in 1 Sud. Dew. Adaw. Rep. 270, and also *Urjun Manic Thakoor v. Ramgunga Deo* (2 Sud. Dew. Adaw. Rep. 139), and *Ranee Soomitra v. Ramgunga Manik* (3 Sud. Dew. Adw. Rep. 40). These cases establish that, according to the custom, a reigning *Rajah* should name a *Jobraj* and *Burra Thakoor*, of whom the first succeeds to the Throne, and the latter to the office of *Jobraj*. Both parties to this appeal admit the custom so far. It is, however, contended by the Appellant that if *Maharajah Essanchunder* appointed a *Jobraj*, he was bound to appoint him partly on account of an alleged promise or intention on the part of the former *Rajah*, *Kristo Kissore*, and partly on the ground that he was the oldest living member of the class out of which, according to the family custom, a *Jobraj* could alone be selected. On the other hand, the Respondent insists, that the choice of the reigning *Rajah*, at least within a certain class, is absolutely free, and cannot be controlled by the wishes of a former *Rajah*, had any such in fact been expressed in favour of the Appellant.

On the argument of this appeal before their Lordships, the Appellant's preferential title by seniority to the *Jobrajship* was sought to be established by evidence of a family custom to be collected from the instances given in the genealogy of actual successions. But where there is evidence of a power of selection the actual observance of seniority even in a considerable series of successions cannot of itself defeat a custom which establishes the right of free choice,

and had the instances been uniform and without exception, that alone would not have been sufficient to support the Appellant's case. Such uniformity of practice was, however, not proved, for several instances appear of infants appointed to the office of *Jobraj*, whilst relatives within the custom, and older in years, were living. This evidence, therefore, failed. Still it was open to the Appellant to contend, as he did, that, in default of any appointment to either office, seniority of age constituted a title by descent to this *Raj*; and to this latter branch of the argument insisted on by the learned Counsel for the Appellant, their Lordships will now direct their attention.

The question now to be considered is, whether, assuming no valid title to the office of *Jobraj* to have been conferred on the Respondent, *Beerchunder Thakoor*, the Appellant establishes a title by seniority. It is not denied that his title to succeed must be made out as legal heir to the last *Maharajah Essanchunder*. The Plaintiff is senior in years to *Beerchunder Thakoor*; he was the half-Brother of *Essanchunder*, and *Beerchunder Thakoor* is *Essanchunder's* Brother by the whole blood. By the general Hindoo law, *Beerchunder Thakoor* would be the heir to *Essanchunder Manicko*, in preference to his half-Brother, were it a disputed succession to divided property. The Counsel for the Appellant have however contended, that this preference of whole blood to half blood does not extend to a *Raj*, and to support this contention they relied on the rule which obtains in certain cases of undivided ancestral estate, when Brothers of the whole and half blood are on the same footing.

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The rule on which they insisted is this, that in the case of a *Raj* or Kingdom, or other impartible estate descending by inheritance to a sole heir, the Court must view the property as though it were joint estate, part of an undivided joint ancestral estate, and apply the law applicable to such an estate, with a view to the selection of the eldest from those who would be equal in degree as coparceners. This position was advanced in the High Court without success. The Court observed that no authority had been cited in its support, and treated the doctrine as novel and unknown to them. The argument has been strongly urged by Mr. *Bell*, and their Lordships will give their reasons for concurring in the opinion which was expressed by the High Court somewhat more fully than was done in that Court.

The normal state of every Hindoo family is joint. Presumably every such family is joint in food, worship, and estate.

In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things. The family in which a title to a Kingdom exists in one member follows this general law but it follows it in part only, for the succession to a Kingdom is an exception to it from the very nature of the thing (see 1 *Strange's "Hindu Law,"* p. 198 [2nd Ed.]), the family may have property distinct from that to which a sole heirship belongs, and may continue joint. Still when a *Raj* is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint owner-

ship, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is, the title to the Throne and the Royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands, and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir. In *Katama Natchear v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 610), it is stated in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindoo law two leading rules of inheritance,—that founded on the religious duty and superior efficacy of oblation and sacrifice; and that of survivorship. Where the latter rule cannot apply, the former must be resorted to. Now, this rule of religious obligation and priority marks the Brother of the whole blood as preferably heir in succession to the estate of his Brother, over the Brother of the half blood only. The reason given is, that he offers more sacrifices, and benefits more the manes of the dead of his family; in their eyes a real substantial ground of preference. In nature, also, he is nearer, and, therefore, satisfies the description nearest of kin. Since, then, the custom in this family, where no appointment of *Jobraj* or *Burra Thakoor* has been made, requires the union of two things to constitute the legal heir, viz. seniority

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in age and nearness of kin (which in truth is in conformity with the general law of Royal descent), and the Claimant has but one of these qualifications in himself, viz. seniority; he does not entitle himself by the family custom. There is no trustworthy evidence that the custom supersedes the general rule as to the precedence of the whole over the half blood. The custom is silent on that point. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom: on general principles, therefore, the Hindoo law must be resorted to in this case, and that does not favour the Appellant's claim; for unless where survivorship furnishes an exception, the whole blood is preferred.

The decision of this question alone would justify the dismissal of this appeal; but their Lordships think it right to review also the decision of the High Court on the facts as to the appointment.

The facts stated by the *de facto Rajah* and deposed to by his witnesses on this part of the case, are few and simple. The fact that the *Rajah* had appointed a day and hour for the celebration of the ceremony of opening a new hall, cannot be doubted. The disputed nomination of the *Jobraj* is said to have been made on that occasion, and during that ceremony the *Rajah* is stated to have directed the intended *Jobraj*, *Burra Thakoor*, and *Kurta* to bathe and come to his presence. Dresses had been prepared, it is said, by orders overnight to the bearer. The dresses were brought on silver dishes to the *Rajah's* presence; the *Jobraj*, *Burra Thakoor*, and *Kurta* were invested with their dresses, appeared, made their salaams, were verbally appointed, gave presents of gold *mohurs*, and, so appointed, received the customary *nuzzurs*.

This contest is in truth a contest as to the title to reign; a matter, rather, of State policy than one proper for judicial decision. Into such disputes, passions stronger than those which affect the minds of ordinary litigants may well be supposed to enter, and fear and favour may sway in an unusual degree the minds of those who depose on either side. The power of an absolute Prince over the fate of those who surround him may enable him to array a body of witnesses deposing to facts to which it may be difficult to offer any positive contradiction. The addition by false testimony of an incident or two, or of a few words, to an actual scene or ceremony, may, if credited, determine the title to a Throne; and it is scarcely possible to conceive a case more requiring than this does, the nicest scrutiny and examination of the evidence. The Defendant, *Beerchunder Thakoor*, is *de facto* Sovereign, and as such has been recognized by the Indian Government, the paramount arbiters in a case of disputed succession. The High Court has founded its judgment on the positive testimony which was given in support of the appointment. The objections stated by the Court below to the testimony of the witnesses, twenty-one in number, are not that they are of a bad character, or that their manner and demeanour induced the Court to disbelieve them; but they are of such a nature as a Court of appeal might be well able to judge of without being under any inferiority to the Judge who tried the case. The exact agreement in the story, even to its details, by all the witnesses, the supposed difficulties as to the ready production of dresses and gold *mohurs*, the dependence of all the witnesses, more or less, on the *Rajah's* power and favour, the absence of all mention

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of the appointment in the early letters of the *Gooroo* to the Superintendent, the want of notification to the British authorities, and of invitations to the members of the family absent from the ceremony, though resident in the Palace, with the ignorance as to any such appointment stated by Ladies of the Palace of high rank, the want of the accustomed religious ceremony and non-observance of Regal State in the usual Throne-rooms,—these, with some minor objections, led the Judge below to discredit a story fully and consistently deposed to by witnesses of a class not ordinarily untrustworthy, nor to be lightly disbelieved. In addition to this, the *de facto Rajah* was considered to be throwing difficulties in the way of the Appellant, who desired to examine the *Gooroo* and some other witnesses; and the singular character of the answer of the latter, which avoided any recognition of the titles of *Jobraj*, or *Thakoor*, or *Kurta*, augmented the matter of suspicion. Their Lordships are far from saying, that the objections urged with so much force by the Counsel for the Appellant are undeserving of a very serious and attentive consideration; they appear to have received such consideration in the High Court, and their Lordships, during the argument, and since, have carefully considered and weighed them. The probabilities, however, are, in their Lordships' opinion, strong in support of the fact of a nomination of the *de facto Rajah* by his deceased Brother to the office of *Jobraj*. An experience of Indian cases shows that few of them, however true, are free from admixture of exaggeration and invention; and it is not necessary to the affirmance of this judgment that their Lordships should believe entirely all the attendant cir-

cumstances detailed by the witnesses who support the nomination.

The *Rajah* was infirm in health ; his state was evidently one calculated to inspire doubt and alarm ; he had two years before declined to appoint to the offices of *Johraj* and *Burra Thakoor* ; he was supposed at that time to desire to be succeeded by his own Son ; but from his reluctance to name him when he was of tender age, he may reasonably be supposed to have considered the appointment of an adult Sovereign the best for his Kingdom. When his own health was seriously impaired, it would become not only to him, but to those around him, a subject of anxious thought how the *Raj* should be preserved. The Appellant had an enemy in the *Gooroo*, who exercised great influence over the mind of the *Rajah*, and sickness and the near prospect of death would not diminish that influence. His Son was still young ; the *Rajah* might naturally suppose him unable to compete with one who laid claim by right to the succession upon an alleged superior title. He might dread also the Appellant's influence over the Hill tribes, whether that influence were real or supposed, or the offspring of a jealous fear. The *Gooroo* might think it best to arrange matters with one *Thakoor* ; and the appointment of the two Sons of the *Rajah*, one, though illegitimate, to the office of *Kurta*, gives an air of probability to the supposition that some arrangement may have preceded the actual celebration of the opening of the Hall, especially as some rumours of an intended appointment appear to have reached the ears of a witness who deposes on the side of the Appellant. Notwithstanding, therefore, the former reluctance of the *Rajah* to appoint either the

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Appellant or *Beerchunder Thakoor*, the changed circumstances prevent the conclusion that his mind was still opposed to the appointment of one of them, his own Brother of the whole blood, whom he might desire to associate with his Son, for the advantage of his Son, of himself, and of the Kingdom. Nor is the concurrence of his spiritual adviser in this view, under the changed circumstances of the case, an improbable supposition.

The *Rajah* was not then in a state in which he was likely to resist any strong pressure upon him to make some appointment to secure the succession. Many feelings might exist in a weak and suspicious mind to explain the absence of the usual ceremonies, invitations, and notification. Fear of the Appellant, and of his influence ; jealousy of the English Officials, and apprehensions, however groundless, of annexation to the British rule ; doubts whether some delay or obstruction might be interposed, might induce his advisers to snatch at an opportunity offered by the approaching ceremonial to add the more important to the less important ceremony. Rival parties appear to have existed in the Palace. It seems little credible that a story of an act having been performed before a large audience which never took place should have been adopted by the conspirators in a fraudulent usurpation, as so much larger a scope for contradiction would thereby be given by such a mode of fabricating the story ; and the falsehood of the alleged nomination would be needlessly exposed to many persons. It is still more improbable that the conspirators, without the slightest necessity, should be found so dangerously communicative of their conspiracy.

The utter worthlessness of this part of the Appellant's case lends considerable support to the Defendant's story: the *Gooroo* made no sign till he himself was dismissed or disgraced. And the reliance which the High Court justly placed on the early resistance by the new *Rajah* to this man, in whose power he would have been had they been common actors in this scheme of fraud, cannot be discarded in considering the weight of the whole body of evidence.

Though, according to the Appellant's story, the *Rajah* had placed his character, and, perhaps his power and Throne, at the mercy of the *Gooroo*, he, before the litigation had ended, appointed another Agent, and deposed the *Gooroo* from power. Can it be supposed that if the plot was really planned, no thought of it had occurred to the Respondent, *Beerchunder Thakoor*, until many hours after the *Rajah's* death. A moment of time would have sufficed to give rise to the thought that the Throne might be reached by contrivance, and yet the evidence discloses this man as at once weak, timid, and needlessly communicative, crying and exclaiming that the *Raj* was ruined, and then entering into an inner chamber to concoct a fraud, which some of the conspirators seem immediately eager to reveal. The evidence for the Appellant on this part of the case is inconsistent. One witness stated that the *Gooroo* told him of the nomination in the afternoon between the hours of three and four of the 17th *Shabun*; whilst the others, speaking of a much later hour of the same day, tell their story of the distress manifested by the *Gooroo* and *Beerchunder Thakoor* because no nomination had been made.

One Letter which is treated as a forgery by the

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High Court, and in defence of which no argument has been advanced before their Lordships, is ascribed to *Beerchunder Thakoor*, who is represented by it as informing the Government that he has no hopes of the *Raj* but from their mercy, whilst at this very time he must reasonably be presumed, if guilty, to have formed the design to usurp the Throne. The family took sides in this dispute, part siding with the Appellant and part with the *de facto Rajah*. The Ladies in the recesses of the Palace might well know nothing of their own knowledge of what actually took place at the ceremony in the Hall. The story they repeat may have been so represented to them; but this kind of evidence is negative against positive testimony. It is so regarded, and rightly, in the judgment of the High Court. The Mother of the legitimate Son of the deceased *Rajah* supports the appointment, and so do the mothers of the two illegitimate Sons. To the argument that they are swayed on the side of the *Rajah* may be opposed the argument, that in these contests of factions in a native Palace, little of unbiassed testimony can be looked for. The Appellant seems not to have wanted friends and supporters there, and even *Chuckerdhu* found support in similar quarters in favour of his groundless claim.

On the subject of the obstruction offered to the Appellant's procurement of evidence, the Respondent may have feigned a fear of the Appellant's measures at his Capital, in order to oppose his being present at the examination of the named witnesses; but, on the other hand, it is idle to suppose that no one but the Appellant himself could have been found to ascertain the identity of the Ladies whom he wished to examine. The Respondent may have feared not the true testi-

mony of the *Gooroo*, but the effect of a fabricated story on the mind of a Court. Amidst all this mass of conflicting probabilities impeaching or supporting the disputed nominations, the High Court proceeded on positive testimony, weighty enough to decide the issue, if not successfully impeached. Unless native testimony is to be thrown aside entirely, and decisions are to pass on conjecture or suspicion instead of evidence, their Lordships think the High Court did not err in coming to a conclusion that the positive testimony must prevail in this case.

The High Court were able to judge of the sufficiency of the reasons alleged by the *Sudder Ameen* for discrediting so numerous a body of respectable witnesses. They, it should be remembered, had been the trusted Officers of the deceased *Rajah*, and were continued by *Beerchunder Thakoor* in the same posts and at the same salaries. From whom but the servants, officers, friends, and members of the family of the deceased *Rajah* could his successor be expected to derive his evidence? These would be the persons most likely to be present at the ceremony of the opening of the Hall: and the objection that all were subject to the will of the *Rajah* can at most be but an argument, and not a conclusive one, for discrediting such testimony. The case is barren of any opposing evidence of persons of equal value who were present in the Hall, and who state that they saw nothing of the alleged ceremony of nomination. Again, the concurrence of testimony of many intelligent witnesses, without circumstantial variety, where the facts are very few and simple, and all would be naturally attentive observers of the scene, furnishes no ground for suspicion; and if the evidence showed

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1869.

NEELKISTO
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some sign of drilling or tutoring in the mode of narration, that, however improper, would not constitute a sufficient reason for discrediting evidence of many trustworthy witnesses, since the evidence of witnesses to a true story is too often subject in native Courts to such a kind of manipulation.

The reasons assigned, therefore, by the Judges of the High Court for differing from the Court below, and believing the evidence which the Lower Court rejected, appear to their Lordships to be satisfactory, and they think that the Appellant has not succeeded in showing that the appointment insisted on by the *de facto Rajah* did not in truth take place. For these reasons their Lordships must humbly advise Her Majesty, that the decree of the High Court of Judicature at *Fort William* ought to be affirmed, and this appeal dismissed with costs.

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a third party, and security for him for advances in the prosecution of his claim to the *Raj*; that the conditions of the Bond to the Mortgagees not having been complied with, there was no sufficient consideration for the Bond and Deed which he had been fraudulently induced to execute. Held, that, in the first instance, it lay on the Plaintiff, who sought to set aside a deed executed by him and perfected by possession, to make out the case alleged by him, and that the *onus probandi* was upon him to establish, at least, a good *prima facie* title to the relief prayed for, so as to cast on the Defendants the burthen of proving the consideration for the Deed.

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subject to the burthen of making *Babooana* allowances to the junior members of the family for maintenance.

In the year 1767, *F.*, the then reigning *Rajah* of *Hunsapore*, having rebelled against the British Government, was expelled by force of arms, and the *Raj* confiscated by Government, who kept possession of the same for upwards of twenty years, and ultimately, in 1790, granted the *Raj* to *C.*, a younger member of the family of *F.*, on whom, some years afterwards, the Government conferred the title of *Rajah*. Held, that although the *Zemindary* was to be treated as the self-acquired estate of *C.*, yet that the grant being from the ruling power, in the absence of evidence of the intention of the grantors to the contrary, carried the incidents of the family tenure as a *Raj*, as the Government's intention must be taken to have been to restore the estate as it existed before its confiscation, with no change other than it affected *F.* and his descendants, and was not, therefore, the creation of a new tenure, but simply a change of tenant, by the exercise of a *vis major*.

Held further, that the title of *Rajah* is not absolutely essential to the tenure of a *Raj*.

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- So close a connection exists in Hindoo Law between religion and succession to property, that the preferable right to perform the *Stradh*, or funeral oblation to the last owner, is a primary fact to be taken into consideration in determining the rule which is to govern the right of succession.
- A Hindoo family migrated many generations ago from *Mithila*, where the *Mitacshara* was, and still is, the prevailing law; and settled in *Bengal*, where the *Daya-bhaga* prevails, acquiring real and personal property situate there. The family continued joint, retaining their customs, usages, and religious observances, as before their migration, according to the doctrines of the *Mitacshara*;—Held, on a question of succession, that the *Mitacshara*, and not the *Daya-bhaga*, the *lex loci*, was the governing authority to determine the right of succession.
- As the presumption is, that the members of a family so emigrated continue such family customs, the onus is upon a party who alleges cessation of such customs to prove that fact.
- Semble*. A family who had so emigrated may retain its religious rites and observances, and yet acquiesce in a devolution of property, in the common course of descent amongst persons of the same race, in the District in which they have settled. According to the *Mitacshara*, a first Cousin is entitled to succeed to the estate to the exclusion of his deceased Cousin's childless Widow. [*Soorendronath Roy v. Mussamut Heeramonee Burmoneah*] ... 81
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may, if authorized by the consent of his kinsmen, adopt a Son to him.

What constitutes consent of the kinsmen must depend on the circumstances of the family. In a joint family, where by the Hindoo law of the District the Widow has only a right to maintenance, if she adopts a Son without her Husband's authority, it is necessary, if her Husband's Father is alive, to obtain his permission, or if he is dead, the consent of all her Husband's surviving Brothers ; but where the Widow takes by inheritance the separate estate of her Husband, then the consent of her Husband's nearest kinsmen is sufficient.

Exposition of the effect of the doctrines of Hindoo Law contained in the Treatises, the *Mitacshara* received in Southern India, the *Mayucha* and *Koustubha* in the *Mahratta* Country, and the *Daya-Bhaga* in *Bengal*, as laid down by Commentators and received as the governing law in India, regarding a Widow's right to adopt a Son to her Husband without his express authority.

The ruling in the case of *Veerapermall Pillay v. Narrain Pillay* (1 Strange's Mad. Cases, p. 121), that it is indispensable, that the Widow should have the authority of her Husband to adopt, examined and questioned.

The duty of a Judge administering Hindoo Law, is not so much to inquire, whether the doctrine dis-

puted is fairly deducible from the earliest authorities, as to ascertain whether it is one that has been received by the particular School of Hindoo law which prevails in the District in which the case arises with which he has to deal, and whether such doctrine has been sanctioned by usage ; as by the Hindoo system of law clear proof of usage will outweigh the written opinion of text writers.

[*The Collector of Madura v. Mootoo Ramalinga Sathupathy*] ... 397

6. The enumeration of *Bandhoos* (cognate kindred) capable of inheriting, in preference to the right of the King to succeed, contained in the translation of the *Mitacshara* by *Colebrooke*, ch. II., sec. 7, held to be illustrative and not exhaustive.

A translation of a passage by *Yajnyawalkya* (the Author of the *Mitacshara*), enumerating the preferential heirs, including among *Bandhoos* the Father's maternal Uncle ; not contained in *Colebrooke's* translation received and acted upon in determining the law of succession of a Hindoo governed by the *Mitacshara*.

The *Viromitrodaya* by *Mitramisira*, is an authority to be looked to, of what may have been left doubtful by the *Mitacshara*, and as declaratory of the law of the *Benares* school.

A Hindoo, whose succession was regulated by the *Mitacshara*, and the law of the *Benares* school, died

without leaving any nearer relative than the Brother of the Grand-mother, *ex parte paterna*. He performed the *Stradh* to the deceased. Held (reversing the decree of the High Court at *Calcutta*), upon the construction of the *Mitacshara* as expounded by the *Viromitrodaya*, that the maternal Uncle of the Father is a *Bandhoo*, a cognate or kindred relation of the Father, and failing nearer *Bandhoos* of the deceased, was entitled to inherit as a relation of the deceased, by a title preferable to that of the Crown, claiming by escheat for want of heirs. [*Gridhari Lall Roy v. The Bengal Government*]... 448

7. Where a family custom of descent to a single heir, as in the case of a *Raj*, is proved to exist, such custom supersedes the general Hindoo law, which still however regulates all beyond the custom.

Suit in the nature of an ejectment by *N.*, the half-brother of the late *Rajah* of *Tipperah*, to recover from *B.* his uterine Brother, in possession as *Rajah*, a *zemindary* forming part of the *Raj* of *Tipperah*, impeaching the title of *B.* as not having been validly appointed *Jobraj* (or young Sovereign), according to the family custom, by the late reigning *Rajah* on grounds first, of an alleged promise by a former *Rajah*, that *N.* should succeed, and secondly, that he was the eldest living of a class out of which, according to the family custom, a *Jobraj* could alone be

selected. The family custom being proved, and that the late *Rajah* appointed *B.* as *Jobraj*:—Held, affirming the judgment of the High Court—

First, that *B.* was duly appointed *Jobraj* by the last reigning *Rajah* and,

Secondly, that the right of succession to the *Raj* was governed by *Koolacher*, or family custom, and devolved on *B.*, as there was no restriction by the family custom on the reigning *Rajah* obliging him to appoint the eldest of his kindred *Jobraj*. [*Neelkisto Deb Burmono v. Beerchunder Thakoor*] ... 523

HUSBAND'S KINDRED,

Necessity of consent of, to adoption by Widow without her deceased Husband's authority. [*The Collector of Madura v. Mootoo Ramalinga Sathupathy*] ... 397

IDOLS.

See "RELIGIOUS ENDOWMENT."

ILLEGITIMATE SON.

Suit by illegitimate Son of a deceased *Zemindar*, one of the *Soodra* class, by a *Dasi*, or dancing girl, kept in his *Zenana* as his Concubine, and recognized by him as his Son, against the *Zemindar* in possession, for maintenance out of the income of the *zemindary*. The Civil Court recognized the Plain-

tiff's title, and directed the payment of Rs. 2,500 for maintenance out of the private property of the late *Zemindar*. The High Court, on appeal, sustained the Court's decree, but did not determine, whether the maintenance was a charge on the *zemindary*, or on the private estate of the late *Zemindar*:—Held, on appeal.

First, that, as the Son was recognized by his natural Father, it was not essential to his title to maintenance that he should have been born in the house of his Father, or of a Concubine possessing a peculiar *status* therein; but, Secondly, in the absence of evidence that there was private property of the late *Zemindar* which descended to the Defendant, and of any declaration, in the decree of the High Court, that the *zemindary* was chargeable with such maintenance, the Judicial Committee remitted the cause, with a declaration of the Plaintiff's *status*, as an illegitimate Son of the late *Zemindar*, and consequent right to maintenance; leaving it for the High Court to determine, whether the decree should be varied, by directing maintenance to be paid out of the income of the *zemindary*, or whether it should direct any further inquiry, in order to ascertain whether there was any other property of the late *Zemindar* upon which it could be charged. [*Mut-tusawmy Jagavara Yettippa Naicker v. Venkataswara Yettaya*] ... 203

INHERITANCE.

See "HINDOO LAW," 1, 2, 6, 7.
"ISTIMARI TENURE."

INTEREST.

See "MORTGAGE."
"PRACTICE," 3.

INTERLOCUTORY DECREE

Not appealed from, open to question on appeal from final decree. [*Shah Mukhun Lall v. Baboo Sree Kishen Singh*] ... 157

ISSUES.

1. In circumstances, from the frame of the issue upon a question of title to land, decrees of the Court below, reversed, without prejudice to a new suit being brought by the Plaintiff, upon a different issue. [*Rajah Burdiant Roy v. Baboo Chuuder Coomar Roy*] ... 115
2. In a suit brought to recover two *mouzahs* in the possession of the Defendants, under a *Mocurrery* tenure, alleged to have been granted by the Plaintiff, the Deeds creating which he impeached as forgeries; the Courts below, without advert- ing to that allegation, or examining the merits of the case, confined the issue in the suit solely to one of limitation, and held the Plaintiff barred by the Regulations of limitation. Such finding reversed, on appeal, by the Judicial Committee, and the suit remanded to the Court below, to be tried on its

- merits. [*Rajah Sahib Perhlut Sein v. Rnn Bahadoor Singh*] 289
3. Where a Defendant has by his answer put his defence upon a certain ground, and issues for trial are framed by the Court to meet the case so pleaded, the Judicial Committee, as the final Court of appeal, will not determine the appeal upon any other issues or grounds, which have not been taken or considered in the Courts below. [*Sreemutty Dossee v. Rance Lalunmonee*] ... 470
4. In a suit against a *Zemindar* by a member of his family for maintenance out of the *zemindary*, no issues as directed by the Code of Civil Procedure (Act, No. VIII. of 1859, secs. 139-141) were recorded by the Primary Judge Held (1) that such omission was not fatal, as the Court could proceed to decision in the manner indicated by section 351 of the Code; and (2) as the Court had directed an inquiry as to maintenance, which was to be deemed equivalent to issues. [*Katchekalayana Rungappa Kalakka Tola Oodier v. Kachivijaya Rungappa Kalakka Tola Oodier*] ... 495

ISTIMARI TENURE.

Held, following *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 191), that the absence of words of limitation in a *Pottah* which create an *Istemrari* tenure, was supplied by evidence (1) of long and uninter-

rupted enjoyment at a fixed rent; and (2) of the descent of the tenure from Father to Son; by which the hereditary character was to be legally presumed. [*Rajah Suttosurrun Ghosal v. Moheshchunder Mitter*] ... 263

JOBRAJ.

Power of the reigning *Rajah* of the *Raj* of *Tipperah* to appoint. [*Neelkisto Deb Burmono v. Beerchunder Thakoor*] ... 523

JOINT FAMILY.

1. Devise by Hindoo Testator to his five Sons to carry on his business. [*Bissonauth Chunder v. Sreemutty Bamasoondery Dossee*] ... 41
2. The normal state of every Hindoo family is joint, the presumption in the absence of proof of division being, that the family is joint in food, worship, and estate. [*Neelkisto Deb Burmono v. Beerchunder Thakoor*] ... 523

JUDGES' REASONS.

The Letters Patent of 1862, creating the High Court of Judicature at *Madras* (section 43), provide, that the reasons given by the Judges of their decision should, on appeal to *England*, be transmitted with the record for the information at the hearing by the Judicial Committee of the Privy Council, which direction it is the bounden duty of the Judges to comply with. [*Katchekalayana Rungappa Kalakka Tola Oodier v. Kachivijaya Rungappa Kalakka Tola Oodier*] ... 495

JURISDICTION.

Of the Courts in *India*, under sec. 326 of the Civil Code of Procedure Act, No. VIII. of 1859, to direct agreement of parties to arbitration to be made a rule of Court. [*Pestonjee Nussurwanjee v. Manockjee*] 112

HUNSAPORE

(Raj of).

See "HINDOO LAW," I.

KOWALA.

See "BILL OF SALE."

LIMITATION

(Words of).

Absence of, in *Pottah* supplied by evidence of long and interrupted enjoyment. [*Rajah Suttosurrin Ghosal v. Moheshchunder Mitter*] 263

See "ISTIMARI TENURE."

LIMITATION OF SUIT.

1. Where boundaries have been determined by the Commission under cl. 2, sec. 13, of *Ben. Reg.* III. of 1828, and no appeal therefrom made to the Special Commissioner within three months; such determination is a bar to a suit seeking to open the question of boundaries. [*Rajah Burodacant Roy v. The Commissioner of the Soonderbuns*] 225
2. An auction sale, under *Ben. Reg.* VIII. of 1819, of the rights of *Putnedars* in a *Putnee talook*, by the

Zemindar for arrears of rent, was set aside by the *Zillah* Court for informality in the notices under that Regulation, and the *Putneedars*, who had been dispossessed, restored, with mesne profits to be paid by the Purchaser, during the time they were out of possession. The *Zemindar* then brought a suit against the *Putneedars* under Act, No. X. of 1859, to recover the arrears of rent which had accrued before and during the time they were out of possession. The High Court decided that the suit, not being brought within three years from the time the rent first became due, was barred by section 32 of Act, No. X. of 1859. Such finding reversed on appeal; the Judicial Committee holding, that the cause of action accrued at the date of the decree reversing the auction sale, and that the suit having been brought within three years from the date of that decree, the time had not by Act, No. XIV. of 1859, run out. [*Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia* 244

3. An Award under *Ben. Reg.* VII. 1822, of the *Thackbust*, or survey authorities, in a disputed question of boundaries, having been made in 1848, a suit was brought in 1861, respecting the same boundaries. *Semble*, that as the Award had not been contested during the three years limited by the Act, No. XIII. of 1848, it operated as a bar to the suit.

By section 32 of Act, No. VIII. of 1859, a Plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

The pendency of an appeal to *England* to determine a question of succession is not such "a good and sufficient cause" as respects the possession of a third party to take the case out of the general law of limitations. [*Rajah Sahib Perhlad Sein v. Maharajah Rajender Kishore Sing*] ... 292

4. *A.* died in 1841, having executed a deed of gift in favour of his eldest Son *B.*, and also a Will, making *B.* Executor, and directing certain allowances to his Widow and children out of his estate. Disputes arose among *A.*'s heirs respecting these instruments, which led to a summary suit under Act, No. XIX of 1841, in which *B.* was, in 1842, put in possession of the whole of *A.*'s estate. Afterwards the members of *A.*'s family acquiesced in the deed and Will, renounced their claims as heirs, and received certain stated allowances given by the Will out of *A.*'s estate. In 1846, *C.*, the youngest Son of *A.* in consideration of advances made to him, executed a Bond, and was afterwards sued by the Bondholder, which suit resulted in a decree against him, and ultimately an execution sale under such decree in 1853. The decree-holder sued *C.* in 1857, seeking to make his share in *A.*'s estate liable, as in case of an intestacy:—Held, by

the Judicial Committee, reversing the decree of the High Court, (1) that the burthen was on the decree-holder to show circumstances to take the case out of the operation of the Regulation of Limitations; and (2) in the absence of such evidence, that the time began to run in 1842, when *B.* was put in possession, and consequently that the suit was barred by *Ben. Reg.* III. of 1793, sec. 14.

Held, further, with respect to the operation of that Regulation, that there is no distinction between a person claiming under an execution sale and one who claims under an assignment or conveyance, [*Rajah Enayet Hossain v. Girdharce Lall and Sumeerchand*] ... 366

MAINTENANCE.

1. The *Rajah* in possession of the *Raj* of *Hunsapore* is subject to *Babosana* allowances to the junior members of the family for maintenance. [*Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*] ... 1
2. Provision made by Husband by his Will for his Widow's maintenance. [*Soorendronath Roy v. Musamat Heeramonee Burmoneah*] 81
3. Right of illegitimate Son of a *Soodra* by a Concubine to maintenance. Query, whether a charge on the income of the *Zemindary*, or the private property of his deceased putative Father. [*Muttusawmy Jagavera Yettappa Naicker v. Venkataswara Yettaya*] ... 203

The *quantum* of maintenance to be allowed a Widow is peculiarly within the province of the Court below, and there must be strong grounds to justify any interference of the appellate Court with the exercise of such discretion. [*The Collector of Madura v. Moottoo Ramalinga Sathupathy*] ... 397

4. It is in the discretion of the Judge in a maintenance suit, in estimating the amount to be awarded, to fix the place of residence. [*Katchekalyana Rungappa Kalakka Tola Oodier v. Kachivijaya Rungappa Kalakka Tola Oodier*] ... 495

MISCARRIAGE OF SUIT.

See "ISSUES," 1.

MITACSHARA.

A translation of a passage by *Yajnyawalkya* (the Author of the *Mitacshara*), enumerating the preferential heirs, including among *Bandhoos* the Father's maternal Uncle; not contained in *Colebrooke's* translation received and acted upon in determining the law of succession of a Hindoo governed by the *Mitacshara*. [*Gridhari Lall Roy v. The Bengal Government*] ... 448

See "HINDOO LAW," 2, 5, 6.

MITHILA.

See "HINDOO LAW," 2.

MOCURRERY.

See "EVIDENCE."

"GRANT."

MORTGAGE.

A Mortgage, Lease, and Agreement, held to constitute one mortgage security, the three instruments being entered into as a device to avoid the usury laws within the meaning of section 9 of *Ben. Reg. XV.* of 1793. Held also, that the Mortgagors were entitled to redeem at any time, before the expiration of the term created by the Lease, on payment of what might be due on the mortgage security for principal and interest at twelve *per cent.* and costs.

In a suit by Mortgagors under an usufructory mortgage to establish their right to redeem; for cancellation of the mortgage deed, possession of the lands, and payment of the surplus:—Held, that the *onus* lies on the Plaintiffs to show that the Mortgagees in possession were paid in full by perception of the profits. [*Shah Mukhun Lall v. Baboo Sree Kishen Singh*] 157

MORTGAGE BOND.

See "BILL OF SALE."

"BOND."

MORTGAGEE IN POSSESSION

See "MORTGAGE."

NEW TRIAL.

Suit remitted for new trial. [*Rajah Sahib Perhlad Sein v. Doorgapersaud Texarre*] ... 286

See "GRANT."

"ISSUES," 1, 2.

NOTICE

Of auction sale for arrears of rent, informality of. [*Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*] ... 244

NUNCUPATIVE WILL.

If a party founds his title on a nuncupative Will, it is incumbent on him, in so uncertain a foundation as spoken words, to allege in the pleadings with the utmost precision, as well as to prove, the words on which the party relies, and every circumstance of time and place. [*Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*] ... 1

ONUS PROBANDI.

1. The presumption is that members of a Hindoo family who emigrated from *Mithala* to *Bengal* continue their family customs, and the *onus* is upon a party who alleges the cessation of such customs to prove that fact. [*Soorendronath Roy v. Mussamat Heeramonee Burmoneah*] 81
2. Held that, in the first instance, it lay on the Plaintiff, who sought to set aside a deed, executed by him and perfected by possession, to make out the case alleged by him, and that the *onus probandi* was upon him to establish, at least, a good *prima facie* title to the relief prayed for, so as to cast on the Defendants the burthen of

proving the consideration for the Deed. [*Kaleepershad Tewarree v. Rajah Sahib Perhlad Sein*] ... 282

See "BOUNDARIES."

"HINDOO LAW," 2.

"MORTGAGE."

ORDER IN COUNCIL

Of the 10th of *April*, 1838.

See "PRACTICES," 1.

PARTIES TO SUIT.

See "PLEADING," 1.

PARTITION.

See "WILL," 2.

PARTNERSHIP ASSETS.

A partnership property consisted in part of Company's paper, which was indorsed in blank by the deceased Son of the Testator shortly before his death, and handed over by him to his Brothers. Held, that it was a mere ordinary partnership transaction, for the purpose of carrying on the business, and that they formed part of the partnership assets, in which the deceased Son was entitled to share after the expenses of the partnership were discharged. [*Bissonauth Chunder v. Sreemulty Bamasoodery Dossee*] ... 41

PART PAYMENT.

See "BILL OF SALE."

PAYMENT

Of money into Court by Co-sharers, under protest, to prevent sale, effect of. [*Fatima Khatoon Chowdry*] 65

See "ACTION."

PERPETUAL SETTLEMENT.

See "AUCTION PURCHASER."

"ISTIMARI TENURE."

"SOONDERBUNS."

PLEADING.

1. Suit by *A.*, one of the co-heirs of *H.*, against *B.*, to recover the whole of *H.*'s real and personal estate in *B.*'s possession, as the alleged adopted Son of *H.* There were other persons entitled with *A.* to share in the succession to *H.*'s estate, who were not made parties to the suit. The *Sudder* Court at *Agra* held, that *B.* had failed to establish his title as adopted Son of *H.*, but declared that *A.* was entitled to succeed, as one of the heirs of *H.*, to a share of his estate, and decreed him the whole estate as sought by the plaint. Such decree, on appeal, so far as it declared that *B.* had failed to establish his title as adopted Son of *H.*, confirmed; but as the decree was manifestly wrong in decreeing to *A.* the entire estate of *H.*, and there were no materials to enable the Judicial Committee to vary the decree, so as to limit

it to the share of the estate to which *A.* had established his right by inheritance, the decree was reversed, and the cause remitted to *India* for inquiries as to the amount of his share. [*Chowdry Pudum Singh v. Koer Oodey Singh*] 350

2. Suit remitted to *India*, for rehearing, with liberty to either party to amend the pleadings. [*Ikbaloowallah v. Sah Bunarsee Doss*] 507

POSSESSION.

Effect of execution of Bill of Sale by Hindoo vendor, passing estate irrespective of actual delivery of possession to Vendee. [*Rajah Sahib Perhlad Sein v. Baboo Budhoo Sein*] 275

See "BILL OF SALE."

"BOND."

POTTAH.

See "ISTIMARI TENURE."

PRACTICE.

1. Pending proceedings before the High Court on an application for a review of judgment, that Court altered the then prevailing practice of permitting an appeal within six months from the date of the judgment allowing or refusing a review. In such circumstances, the six months prescribed by the Order in Council of the 16th of April, 1838, from the date of the decree having expired, special

- leave to appeal from the original decree and the Order refusing a review was allowed. [*Nogender Chunder Ghose v. Mahomed En-suff*] 107
2. As a rule, the Judicial Committee will not disturb the concurrent judgments of the Courts below on a question of facts, if the facts as found are decisive of the real issue between the parties. In circumstances, from the frame of the issue upon a question of title to land, decrees of the Court below, reversed, without prejudice to a new suit being brought by the Plaintiff upon a different issue. [*Rajah Burdacant Roy v. Baboo Chunder Coomar Roy*] ... 145
3. It is not too late, on an appeal from a final decree, to raise a question as to interest decided in an Interlocutory decree not appealed from. [*Shah Mukhun Lall v. Baboo Sree Kishen Singh*] 157
4. The re-hearing of an appeal heard *ex parte*, on which an Order in Council had been made, refused, the default in not appearing and contesting the appeal being occasioned by the Agents of the Respondent, who sought to have the appeal re-heard.
A re-hearing will not be allowed except under very special circumstances. [*Exp. Kisto Nauth Roy*] 254
5. Costs of an appeal directed to be taxed and to be costs in the cause to be dealt with by the High Court. [*Rajah Sahib Perhlad Sein v. Doorgapersaud Tewarree*] 286
6. A miscarriage of a suit was occasioned by the manner in which the issues were framed by the Judge, the costs of appeal were directed to be costs of the cause. [*Rajah Sahib Perhlad Sein v. Doorgapersaud Tewarree*] 239
7. The High Court dismissed an appeal from the *Zillah* Court on the ground, that it involved the same question as had been decided by them in another suit brought by the Plaintiff in respect of the validity of a *Zur-i-peshgi* deed. The decision in the prior suit was, on appeal, reversed by the Judicial Committee. In such circumstances, on the appeal from the last decision coming on for hearing *ex parte*, their Lordships, with the consent of the Appellant, remitted the case to the High Court, with a declaration, that the deed was valid; and with directions that, if the Respondent did not appear within a reasonable time, to be fixed by the High Court, to dismiss the appeal from the *Zillah* Court, and, in the event of the Respondent appearing, then to hear the case on the merits. [*Kaleepershad Tewarree v. Lalla Binda Lall*] 343
8. In the Court below, sworn translations of Sanscrit works, little known, embodying Hindoo Law, as to the custom in the different Schools in respect to the law of adoption, were admitted and acted

on by the Courts in *India*. On special application, the Judicial Committee ordered such translations to be sent by the Registrar of the High Court in *India*, and to form part of the record, to be used on the hearing of the appeal. [*The Collector of Madura v. Mootoo Ramalinga Sathupathy*]

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9. The Judicial Committee, as the final Court of appeal, will not determine the appeal upon any other issues or grounds, which have not been taken or considered in the Courts below. [*Sicemully Dossee v. Rance Lalunmence*]

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10. The Letters Patent of 1862, creating the High Court of Judicature at *Madras* (section 42), provide that the reasons given by the Judges of their decision should, on appeal to *England*, be transmitted with the record for the information at the hearing by the Judicial Committee of the Privy Council, which direction it is the bounden duty of the Judges to comply with. [*Katchekaleyana Rungappa Kalakka Tola Oodier v. Kachivijaya Rungappa Kalakka Tola Oodier*] 495

PUTNEE TENURE.

Sale for arrears of rent, under *Ben. Reg. VIII.* of 1819. [*Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*] 244

See "LIMITATION OF SUIT," 2.

RAJ.

1. The *zemindary* of *Hunsapore*, in *Behar*, is an impartible Raj descending to a single heir. [*Bahoo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*] 1
2. Successor to the *Raj* of *Tipperah*, by *Jebraj*. Power of appointing *Jebraj* by reigning *Rajah*. [*Neel-kiste Deb Burmono v. Beerckunder Thakeer*] 523

REBELLION.

See "HINDOO LAW," 1.

RECORD.

See "PRACTICE," 8, 10.

RE-HEARING OF APPEAL.

The re-hearing of an appeal heard *ex parte*, on which an Order in Council had been made, refused; the default in not appearing and contesting the appeal being occasioned by the Agents of the Respondent, who sought to have the appeal re-heard.

A re-hearing will not be allowed except under very special circumstances. [*Exp. Kisto Nauth Roy*]

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RELIGIOUS ENDOWMENT.

Under the terms of a *Soluhnamah*, compromising a suit brought to obtain possession of a share in a family ancestral estate, it was provided (*inter alia*), that S., the elder

Brother, should, in consideration of the rents of a specified part of the family estate, estimated to cover the expenses, perform the *Deb Sheba* (worship of the family Idols) and other religious ceremonies for the family. This compromise was sanctioned by the Court, and a decree made thereon. On a motion by S. to enforce the decree on an allegation that R., his Brother, had not performed a part of the compromise by putting him in possession, the Court decreed execution of the decree, and awarded mesne profits; R. also obtained a further Order for execution on the ground that S. had not performed the trust, and that he had been compelled to perform the religious ceremonies at his own expense. This the Court refused to enforce, as the omission was caused by his default in not putting S. in possession of the lands. Held, that proof of the nonperformance of the religious ceremonies by S. was not a condition precedent to the enforcement by S. of the decree.

In a suit brought by R. against S. to recover moneys alleged to have been expended by R. in the performance of the *Deb Sheba*, in consequence of B. neglecting to perform the trust as to the family worship, the Plaintiff's witnesses having failed to prove any damages, he called the Defendant as a witness, who gave evidence to the effect, that the Plaintiff had no claim; and the Court refused to

allow the Plaintiff to cross-examine him. Held, that although the refusal to cross-examine was not justifiable, yet, from the other evidence in the suit, it was clear, that the Plaintiff had sustained no damage or had, in the circumstances, a right of action. [*Radha Jeebun Moostuffy v. Taramonee Dossee*]

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RENT.

Suit under Act, No. X. of 1859, to recover arrears of rent. [*Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*] ... 244

RES INTER ALIOS ACTA.

See "LIMITATION OF SUIT," 2.

REVENUE,

Sale for arrears of.

See "AUCTION PURCHASER."

REVIEW OF JUDGMENT.

Time prescribed by Order in Council of the 10th April, 1838, for appealing to the Queen in Council, run out: In circumstances, special leave to appeal allowed. [*Nogender Chunder Ghose v. Mahomed En-suff*] ... 107

REVOCATION

Of agreement to submit to Arbitration. [*Pestonjee Nussurwanjee v. Manockjee*] ... 112

See "AWARD."

"CODE OF CIVIL PROCEDURE."

RIPARIAN RIGHTS.

A detached *chur*, independent of usage in a tidal river, belongs to neither riparian proprietor; and the fact that it was subtended by the land of one is not *per se* enough to entitle him to it. [*Sree Eckowrie Sing v. Heeraloll Seal*] ... 136

See "ALLUVION."

SALE.

See "ACTION."

"AUCTION PURCHASER."

"LIMITATION OF SUIT," 2.

SELF ACQUIRED PROPERTY.

See "WILL," 1.

SEPARATE APPEALS

By two Appellants having a common interest. On reversal, one set of costs only allowed. [*Shah Mukhun Lall v. Baboo Sree Kishen Singh*] 157

SHRADH.

So close a connection exists in Hindoo Law between religion and succession to property, that the preferable right to perform the *Shradh*, or funeral oblation, to the last owner, is a primary fact to be taken into consideration in determining the rule which is to govern the right to succession. [*Soorendronath Roy v. Mussumut Heeramonee Burmoneah*] ... 81

SOLUNAMAH.

See "RELIGIOUS ENDOWMENT."

SOONDERBUNS.

1. The *Soonderbuns* were not included in the Perpetual Settlement, but remained the property of Government.

Construction of cl. 2, sec. 13, of *Ben. Reg. III.* of 1828, with respect to the determination of the boundaries of the *Soonderbuns*. [*Rajah Buro-dacant Roy v. The Commissioner of the Soonderbuns*] ... 225

See "BOUNDARIES," 2, 3.

SPECIAL LEAVE TO APPEAL.

See "APPEAL," 1.

SUCCESSION.

A family emigrated from *Mithila* to *Bengal*, who adhered to the *Mithila* rites and ceremonies. Held to be governed by the *Mitacshara*. [*Soorendronath Roy v. Mussumut Heeramonee Burmoneah*] ... 81

See "HINDOO LAW," 1, 2, 6, 7.

TENURE.

See "HINDOO LAW," 1, 7.

TESTAMENTARY POWER OF HINDOO.

See "WILL."

TIDAL RIVER.

See "ALLUVION."

TITLE.

Party in possession by virtue of a Magistrate's Order, under Act, No. IV. of 1840, effect of. [*Rajah Burdacant Roy v. Baboo Chunder Coomar Roy*] ... 145

See "HINDOO LAW," 6.

TRANSFER.

See "TROVER."

TROVER.

Suit in the nature of an action of trover, by the Plaintiff, to recover Company's paper, as heir, such Notes being part of his deceased Mother's estate, against a Purchaser without notice and the Vendor, his Brother, alleging first, that the dealing with the Notes on the part of his Brother was illegal and contrary to the Plaintiff's rights as heir; and secondly, that in a previous suit against his Brother, regarding the Notes, he had obtained a decree against him in respect of one of the Notes sued for, but had not enforced judgment. The suit was dismissed by the Courts in *India* on the grounds (1) of limitation, under Act, No. XIV. of 1859, and (2) as barred by the previous suit. On appeal, such decree reversed, as it appeared, that the real point in issue, the validity of the trans-

fer of the Notes, had not been heard, and the suit remitted back to the Judicial Commissioner at *Lucknow*, to give directions to the Court of First instance to re-hear the case, with liberty to either party to amend the pleadings. [*Ikbaloowlah v. Sah Bunarsee Doss*] ... 507

TRUST.

See "RELIGIOUS ENDOWMENT,"

USUFRUCTUARY MORTGAGE

See "BOND."

"MORTGAGE."

USURY.

1. Construction of *Ben. Reg. XV.* of 1793, as to usurious interest.
A Mortgage lease, and agreement, held to constitute a mortgage security, the three instruments being entered into as a devise to avoid the usury Laws within the meaning of section 9 of *Ben. Reg. XV.* of 1793. [*Shah Mukhun Lall v. Baboo Sree Kishen Singh*] 157
2. Suit to recover principal and interest on a *Tumasook*, or Bond, dismissed under *Ben. Reg. XV.*, 1793, sec. 9, on the ground of usury.
A. granted a Bond to B. to secure an advance of money. C. acted as B.'s Agent. A Lease was afterwards granted by A. to D., a servant of C., at a colorable rent, and,

subsequently, an Under-lease was made by *D.* to *E.*, a relative of *A.*, the consideration for which was also colorable, and made with a view to elude the Usury Laws.

Held, that the Bond, Lease, and the Under-lease, formed one entire transaction, which was tainted with usury, and, therefore, void under *Ben. Reg. XV. of 1793*, secs. 8 and 9. [*Wise v. Juggo-bundhoo Bose*] ... 477

VIROMITRODAYA.

The *Viromitrodāya* by *Mitrāmisira*, is an authority to be looked to, of what may have been left doubtful by the *Mitācsharā*, and as declaratory of the law of the *Benares* school. [*Gridhari Lal Roy v. The Bengal Government*] ... 448

See "HINDOO LAW," 6.

WIDOW

(Hindoo).

1. Held, on the construction of a Will, not entitled to the share of the *corpus* of her deceased Husband in a joint estate, but to the accumulations of such *corpus*. [*Bissonauth Chunder v. Sreemutty Bamasoondery Dossee*] ... 41
2. A Will of a Hindoo, whose family were governed by the *Mitācsharā*, made in favour of her first cousin, who lived in joint estate with him, to the disinherison of his Widow, except a small provision for her maintenance, in the event of her leaving the family

home, in the circumstances, and upon the evidence, declared proved and established. [*Soorendronath Roy v. Mussamut Heeramonee Burmoneah*] ... 81

3. Power of Widow to adopt a Son to her deceased Husband, without his authority. [*The Collector of Madura v. Moottoo Ramalinga Sathupathy*] ... 397

WILL.

1. Although there is no mention in the ancient Hindoo Treatises of a testamentary disposition, yet modern authorities have determined, that a Hindoo has testamentary power, which can be exercised by him, at least within the limits which the Hindoo law prescribes to alienation by gift *inter vivos*.

Where the *Mitācsharā* prevails, a Hindoo without male descendants may dispose by Will of his separate and self-acquired property, whether movable or immovable. If there be male descendants, he may by Will dispose of self-acquired movable property, subject to the restriction, that he cannot wholly disinherit any one of such descendants. Whether, by the *Benares* school of Hindoo law, a Hindoo can by Will make an unequal distribution of self-acquired immovable property without the consent of his male descendants? *Quære*. [*Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*] ... 1

2. A Hindoo Testator by his Will,

directed, that his five Sons, continuing joint in food, should take care of his property and carry on his business, and that on the death of any one of his Sons, "not leaving Sons and leaving Daughters," that the Daughters should receive a certain sum out of the estate, and in the event of any one of his Son's Widows continuing in the family, provision was made for her maintenance; but if the Widow should leave the family, she was to receive the sum of Rs. 2,000 out of the Testator's real and personal property. After the Testator's death, the five Sons lived together and carried on their Father's business, without any partition taking place. One of the Sons died, leaving a Widow and Daughters. Held, upon the construction of the Will (1), that the five Sons took an absolute estate in the property, and (2) that on the death of one of the Sons, his share in the *corpus* did not go to his Widow, but (3) that his share of the accumulations was not affected by the Will, and passed to his Widow by descent.

Held, further, that in the event, which happened, of one of the Widows leaving the family, she was entitled to Rs. 2,000, independently of her Husband's share in the accumulations.

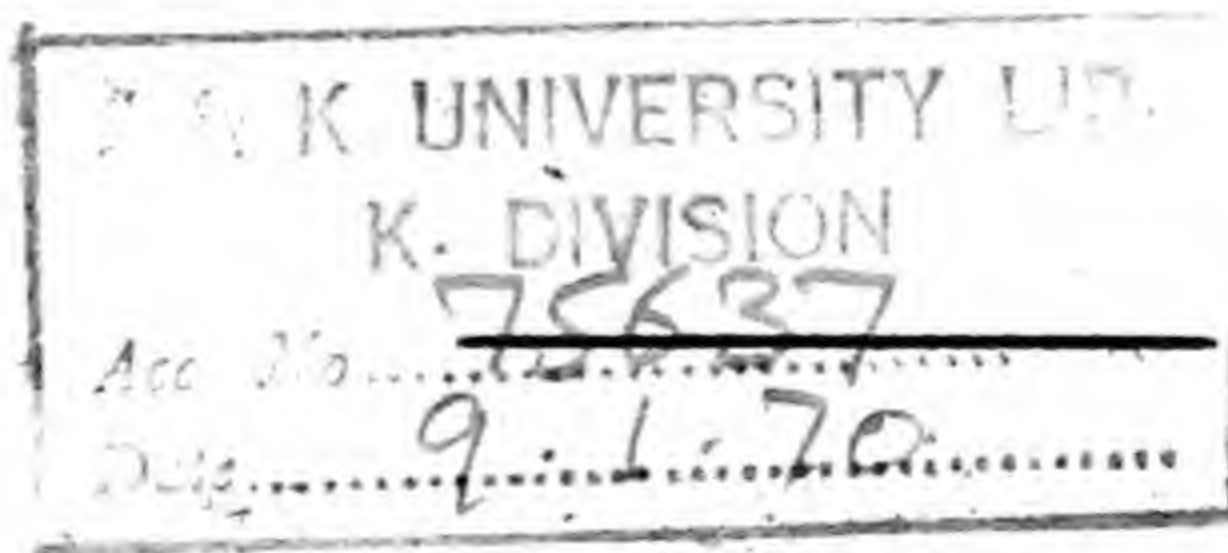
In the absence of any direction to the contrary, it is the rule of Hindoo law that accumulations go with the capital. [*Bissonauth Chunder v. Sreemutty Bamason-dery Dossee*] ... 41

3. A Will of a Hindoo, whose family were governed by the *Mitacshara*, made in favour of his first Cousin, who lived in joint estate with him, to the disinherison of his Widow, except a small provision for her maintenance, in the event of her leaving the family home, in the circumstances, and upon the evidence, declared proved and established. [*Soorendronath Roy v. Mussamut Heeramonee Burmoneah*] ... 81

ZUR-I-PESHGI.

(Usufructuary mortgage.)

See "BOND."



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